Recommendations and Reports *of the* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

JULY 1, 1974--DECEMBER 31, 1977

VOLUME

4

Composite Index---Volumes 1-4

R. K. Berg

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Recommendations and Reports *of the* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

JULY 1, 1974–DECEMBER 31, 1977

VOLUME 4

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PREFACE

The Administrative Conference of the United States is a permanent, independent Federal agency established in 1964 by the Administrative Conference Act, 5 U.S.C. §§ 571-576, and activated in January 1968. It is the successor of two temporary Administrative Conferences, established by President Eisenhower in 1953 and by President Kennedy in 1961. Its mission is to monitor all aspects of the administrative process in all of the executive and independent agencies; to identify and analyze the causes of administrative inefficiency, delay and unfairness; to recommend to the agencies, the President, the Congress and the Judicial Conference of the United States specific means of improvement; and to furnish, on agency request, assistance and advice on matters of administrative procedure.

The chief executive of the Conference is a full-time Chairman, appointed by the President with Senate confirmation for a five-year term. Its Council consists of the Chairman and ten members appointed by the President for three-year terms, drawn from Federal agencies and from private life. The 91-member Assembly of the Conference consists of the Council, 44 high-level representatives designated by 36 major departments and agencies of the Federal Government, and 36 distinguished private citizens — practicing lawyers, academicians, state officials and others — who are specially knowledgeable in the field of administrative procedure.

The Assembly conducts its business much like a legislative body, in Plenary Sessions that convene twice a year. The proposals to be considered at these sessions are generally developed by standing committees, which use the personnel resources of the Chairman's office and approximately 30 part-time consultants (mostly law professors) to conduct the detailed studies that form the basis of their reports. The functions of providing advice and assistance to the agencies, presenting Conference recommendations to the agencies and to Committees of the Congress, and seeking implementation of Conference proposals are the responsibilities of the Chairman, who has the assistance of a small, highly qualified staff, and the Conference's part-time consultants.

This fourth volume of Recommendations and Reports of the Administrative Conference of the United States covers the period July 1, 1974 through December 31, 1977. During this time five Plenary Sessions were held, at which the Conference adopted Recommendations 75–1 through 77–3 and two formal Statements.

The material contained in the first part of this volume consists of the operative instruments governing the structure and work of the Conference, a listing of its membership, and the recommendations and statements which it has adopted. The latter part of the volume, commencing at page 865, contains consultant and staff reports, which do not have the formal endorsement of the full Conference but were the basis for recommendations adopted. Some of these have already been published in scholarly journals, and where that is the case the earlier publication has been produced by photo offset. A bibliography listing other major consultant and staff reports is included. Finally, this volume presents a composite Index to the published works of the Conference since its inception in 1968, and also provides indexes to the recommendations of the temporary Conferences of 1953 and 1961.

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THE ADMINISTRATIVE CONFERENCE ACT

[Public Law 88–499, August 30, 1964, 78 Stat. 615, as codified by Public Law 89–554. September 6, 1966, 80 Stat. 388, as amended by Public Law 92–526 October 21, 1972, Title 5 U.S.C., Chapter 5, Subchapter III, Sections 571 through 576.]

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§ 571 Purpose.

It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

§ 572 Definitions.

For the purpose of this subchapter—

(1) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges. and obligations of private persons through rule-making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) "administrative agency" means an authority as defined by section 551(1) of this title; and

(3) "administrative procedure" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

§ 573 Administrative Conference of the United States.

(a) The Administrative Conference of the United States consists of not more than 91 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of—

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575 (b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 36 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the Federal Government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

§ 574 Powers and duties of the Conference.

To carry out the purpose of this subchapter, the Administrative Conference of the United States may—

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administra-

tive agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; and

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

§ 575 Organization of the Conference.

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference. Specifically, it has the power to—

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposals so entered shall accompany the Conference recommendation in a publication or distribution thereof; and,

(2) adopt bylaws and regulations not inconsistent with this subchapter for carrying out the functions of the Conference, including the creation of such committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to—

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of committees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to—

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Federal Government;

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the Government, including responsibility for encouraging Federal agencies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, to contract for the performance of such studies with any public or private persons, firm, association, corporation, or institution under title III of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251–260), and to use from time

to time, as appropriate, experts and consultants who may be employed in accordance with section 3109 of this title at rates not in excess of the maximum rate of pay for grade GS–15 as provided in section 5332 of this title;

(11) utilize, with their consent, the services and facilities of Federal agencies and of State and private agencies and instrumentalities with or without reimbursement;

(12) accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairman. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of Federal income, estate, or gift taxes property accepted under this section shall be considered as a gift, devise, or bequest to the United States;

(13) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679(b) of the Revised Statutes (31 U.S.C. 665(b));

(14) on request of the head of an agency, furnish assistance and advice on matters of administrative procedures; and

(15) exercise such additional authority as the Council or Assembly delegates to him.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

§ 576 Appropriations.

There are authorized to be appropriated sums necessary not in excess of $760,000 for the fiscal year ending June 30, 1974, $805,000 for the fiscal year ending June 30, 1975, $850,000 for the fiscal year ending June 30, 1976, $900,000 for the fiscal year ending June 30, 1977, and $950,000 for the fiscal year ending June 30, 1978, and for each fiscal year thereafter, to carry out the purposes of this subchapter.

BYLAWS OF THE ADMINISTRATIVE CONFERENCE

(As revised June 4, 1976)

SECTION 1. ESTABLISHMENT AND OBJECTIVE

The Administrative Conference Act, 5 U.S.C. §§ 561 *et seq.* (1970), 78 Stat. 615 (1964), authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the Federal Government. The purpose of the Administrative Conference is to improve the administrative procedure of Federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

SECTION 2. MEMBERSHIP

(A) GENERAL

Each member is expected to participate in all respects according to his own views and not necessarily as a repesentative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(B) TERMS OF NONGOVERNMENT MEMBERS

The terms of non-Government members, who are appointed by the Chairman with the approval of the Council, shall terminate at 2-year intervals from June 30, 1970. No more than 10 percent of such members shall at any time be in continuous service beyond a third term.

(C) ELIGIBILITY AND REPLACEMENTS

(1) A member designated by a Federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he leaves the service of the agency or department. Designations and redesignations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he enters full-time Government service. In the event a non-Government member of the Conference resigns or becomes ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

(D) ALTERNATES

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, an alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee.

Section 3. Committees

The following shall constitute the standing committees of the Conference:

1. Committee on Agency Decisional Processes;
2. Committee on Agency Organization and Personnel;
3. Committee on Compliance and Enforcement Proceedings;
4. Committee on Grants, Benefits and Contracts;
5. Committee on Informal Action;
6. Committee on Judicial Review;
7. Committee on Licenses and Authorizations;
8. Committee on Ratemaking and Economic Regulation; and
9. Committee on Rulemaking and Public Information.

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

Section 4. Liaison Arrangements

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, Federal agencies, and professional associations which are not represented on the Conference. Persons appointed under these arrangements may participate in the activities of a designated committee without vote; and may participate in the deliberations of the Conference with privileges of the floor, but without vote.

SECTION 5. GENERAL

(A) MEETINGS

All sessions of the Assembly shall be public. Privileges of the floor, however, extend only to: (1) Members of the Conference, (2) persons appointed pursuant to section 4, (3) consultants and staff members insofar as matters on which they have been engaged are under consideration, and (4) persons who, prior to the commencement of the meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly.

(B) QUORUMS

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

(C) SEPARATE STATEMENTS

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation in the Federal Register. A member's failure to file or join in such a separate statement does not necessarily indicate his agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Secretary not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(D) AMENDMENT OF BYLAWS

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(E) PROCEDURE

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

COUNCIL MEMBERS

(January 1, 1978)

ROBERT A. ANTHONY
Chairman

WALTER GELLHORN, Professor of Law, Columbia University School of Law, New York, N.Y.

MARION EDWYN HARRISON, lawyer, Washington, D.C.

BETTY SOUTHARD MURPHY, Member, National Labor Relations Board

EDWARD C. SCHMULTS, lawyer, New York, N.Y.

RICHARD C. VAN DUSEN, lawyer, Detroit, Michigan

EDWIN M. ZIMMERMAN, lawyer, Washington, D.C.

STAFF OF THE ADMINISTRATIVE CONFERENCE

(January 1, 1978)

RICHARD K. BERG
Executive Secretary

JOSEPH B. SCOTT
Executive Director

DAVID B. H. MARTIN
Research Director

JEFFREY S. LUBBERS
Staff Attorney

DAVID M. PRITZKER
Staff Attorney

STEPHEN H. KLITZMAN
Staff Attorney

KATHERINE KLEIN
Administrative Assistant

NORMA B. SMITH
Administrative Officer

SUE J. BOLEY
Librarian and Information Officer

MEMBERS OF THE CONFERENCE

(January 1, 1978)

WILLIAM H. ALLEN, lawyer, Washington, D.C.
ROBERT C. BAMFORD, Chief Administrative Law Judge, Interstate Commerce Commission
JOAN Z. BERNSTEIN, General Counsel, Environmental Protection Agency
PETER A. BRADFORD, Commissioner, Nuclear Regulatory Commission
JOHN A. BUGGS, Staff Director, U.S. Commission on Civil Rights
CLARK BYSE, Professor of Law, Harvard Law School, Cambridge, Massachusetts
HAROLD M. CARTER, Assistant General Counsel, Department of Agriculture
BETTY JO CHRISTIAN, Commissioner, Interstate Commerce Commission
CARIN A. CLAUSS, Solicitor of Labor, U.S. Department of Labor
TIMOTHY F. CLEARY, Chairman, Occupational Safety and Health Review Commission
SHELDON S. COHEN, lawyer, Washington, D.C.
JOHN H. CONLIN, Administrative Law Judge, Federal Communications Commission
JEROME A. COOPER, lawyer, Birmingham, Alabama
RICHARD M. COOPER, Chief Counsel, Food and Drug Administration, Department of Health, Education, and Welfare
LOUIS A. COX, General Counsel, United States Postal Service
CHARLES B. CURTIS, Chairman, Federal Energy Regulatory Commission
KENNETH CULP DAVIS, Professor of Law, University of San Diego School of Law
THOMAS M. DEBEVOISE, Dean, Vermont Law School, South Royalton, Vermont
RONALD M. DIETRICH, Vice President, Consolidated Rail Corporation, Philadelphia, Pennsylvania
ROBERT G. DIXON, JR., Professor of Law, Washington University School of Law, St. Louis, Missouri
HARRY T. EDWARDS, Professor of Law, University of Michigan Law School, Ann Arbor, Michigan
FREDERICK N. FERGUSON, Deputy Solicitor, Department of the Interior
BETTY B. FLETCHER, lawyer, Seattle, Washington
JAMES F. FLUG, Energy Action Committee, Washington, D.C.
RONALD B. FRANKUM, lawyer, Del Mar, California
HERSCHEL H. FRIDAY, lawyer, Little Rock, Arkansas
THEODORE J. GARRISH, General Counsel, Consumer Product Safety Commission
WILLIAM T. GENNETTI, General Counsel, Small Business Administration
ROBERT L. GILLIAT, Assistant General Counsel, Department of Defense
JACK GREENBERG, Director-Counsel, NAACP Legal Defense Fund, New York, New York
RICHARD L. GRIFFITH, lawyer, Honolulu, Hawaii
WOLF HABER, Assistant General Counsel, Department of the Treasury
JOHN M. HARMON, Assistant Attorney General, Office of Legal Counsel, Department of Justice
THOMAS E. HARRIS, Chairman, Federal Election Commission
LAWRENCE W. HAYES, Assistant General Counsel, Federal Home Loan Bank Board
GEOFFREY C. HAZARD, JR., Professor of Law, Yale Law School, New Haven, Connecticut
S. NEIL HOSENBALL, General Counsel, National Aeronautics & Space Administration
HOWARD JENKINS, JR., Member, National Labor Relations Board
RHODA H. KARPATKIN, Executive Director, Consumers Union, Mt. Vernon, New York
LINDA HELLER KAMM, General Counsel, Department of Transportation
CORNELIUS B. KENNEDY, lawyer, Washington, D.C.

VICTOR H. KRAMER, Professor of Law, Georgetown University Law Center, Washington, D.C.
ALLIE B. LATIMER, General Counsel, General Services Administration
PHILIP A. LOOMIS, JR., Commissioner, Securities and Exchange Commission
K. E. MALMBORG, Assistant Legal Advisor, Department of State
MALCOLM S. MASON, Chairman, Departmental Grant Appeals Board, Department of Health, Education and Welfare
TURNER H. MCBAINE, lawyer, San Francisco, California
GUY H. MCMICHAEL III, General Counsel, Veterans Administration
ALFRED MEISNER, Assistant General Counsel, Department of Commerce
IRA M. MILLSTEIN, lawyer, New York, New York
ANTHONY L. MONDELLO, lawyer, Bethesda, Maryland
CLARENCE MORSE, Commissioner-Vice Chairman, Federal Maritime Commission
CANTWELL F. MUCKENFUSS III, Counsel to the Chairman, Federal Deposit Insurance Corporation
WILLIAM M. NICHOLS, General Counsel, Office of Management and Budget
ELEANOR HOLMES NORTON, Chair, Equal Employment Opportunity Commission
THOMAS J. O'CONNELL, Counsel to the Chairman, Board of Governors Federal Reserve System
OWEN OLPIN, lawyer, Los Angeles, California
CLARK H. ONSTAD, Chief Counsel, Federal Aviation Administration
JOHN W. PETTIT, lawyer, Washington, D.C.
RICHARD W. POGUE, lawyer, Cleveland, Ohio
RUTH T. PROKOP, General Counsel, Department of Housing and Urban Development
JOHN V. RAINBOLT II, Commissioner, Commodity Futures Trading Commission
KATHERINE E. SASSEVILLE, Commissioner, Minnesota Public Service Commission, St. Paul, Minnesota
STUART E. SEIGEL, Chief Counsel, Internal Revenue Service
J. CLAY SMITH, JR., Associate General Counsel, Federal Communications Commission
OTIS M. SMITH, Vice President & General Counsel, General Motors Corporation, Detroit, Michigan
MICHAEL N. SOHN, General Counsel, Federal Trade Commission
H. PATRICK SWYGERT, General Counsel, U.S. Civil Service Commission
ROBERT THOMAS THOMPSON, lawyer, Greenville, South Carolina
PENELOPE H. THUNBERG, economist, Washington, D.C.
ROBERT L. TRACHTENBERG, Director, Bureau of Hearings & Appeals, Social Security Administration
HARRY H. VOIGT, laywer, Washington, D.C.
JAMES E. WESNER, lawyer, Washington, D.C.
LEE R. WEST, Member, Civil Aeronautics Board
JERRE S. WILLIAMS, Professor of Law, University of Texas Law School, Austin
FRANK M. WOZENCRAFT, lawyer, Houston, Texas
ROBERT H. YOUNG, lawyer, Philadelphia, Pennsylvania

LIAISON MEMBERS OF THE CONFERENCE

January 1, 1978

PAUL G. DEMBLING, General Counsel, U.S. General Accounting Office
CLYDE S. DU PONT, Chairman, Postal Rate Commission
FRED J. EMERY, Director, Office of the Federal Register
ALICE L. O'DONNELL, Director of Inter-Judicial Affairs, The Federal Judicial Center
HAROLD LEVENTHAL, Judge, United States Court of Appeals
JOSEPH F. SPANIOL, JR., Deputy Director, Administrative Office of the United States Courts
HENRY N. WILLIAMS, General Counsel, Selective Service System

FORMER MEMBERS OF THE COUNCIL

(July 1, 1974–December 31, 1977)

Position at time of Membership

JOHN W. BARNUM, Deputy Secretary, Department of Transportation
PHILIP W. BUCHEN, Counsel to the President
ROBERT G. DIXON, JR., Assistant Attorney General, Department of Justice
LEWIS A. ENGMAN, Chairman, Federal Trade Commission
LEONARD GARMENT, Counsel to the President
CARLA A. HILLS, Secretary, Department of Housing and Urban Development
HAROLD L. RUSSELL, lawyer, Atlanta, Georgia
RICHARD B. SMITH, lawyer, New York, New York
HAROLD R. TYLER, JR., Deputy Attorney General, Department of Justice
RICHARD E. WILEY, Chairman, Federal Communications Commission

FORMER CONFERENCE MEMBERS WITH POSITIONS AT TIME OF MEMBERSHIP

(July 1, 1974—December 31, 1977)

Robert F. Adams, lawyer, Mobile, Alabama
Charles E. Allen, General Counsel, Federal Home Loan Bank Board
Richard S. Arnold, lawyer, Texarkana, Arkansas
H. Gregory Austin, General Counsel, Small Business Administration
Frank R. Barnako, Chairman, Occupational Safety and Health Review Commission
Frank A. Bartimo, Assistant General Counsel, Department of Defense
Michael A. Brown, General Counsel, Consumer Product Safety Commission
Tyrone Brown, lawyer, Washington, D.C.
Michael F. Butler, General Counsel, Federal Energy Administration
Donald A. Campbell, Judicial Officer, Department of Agriculture
Charles L. Clapp, Commissioner, Interstate Commerce Commission
Manuel Cohen, lawyer, Washington, D.C.
Calvin J. Collier, General Counsel, Federal Trade Commission
H. Dale Cook, Director, Bureau of Hearings and Appeals, Social Security Administration
John J. Corcoran, General Counsel, Veterans Administration
William O. Doub, Commissioner, Atomic Energy Commission
Bernard Dunau, lawyer, Washington, D.C.
Stanley Ebner, General Counsel, Office of Management and Budget
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JOHN N. NASSIKAS, Chairman, Federal Power Commission
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FORMER LIAISON MEMBERS OF THE CONFERENCE

Position at Time of Membership

WILLIAM E. FOLEY, Deputy Director, Administrative Office of the United States Courts
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SEYMOUR WENNER, Administrative Law Judge, Postal Rate Commission
JAMES A. WILDEROTTER, General Counsel, Energy Research and Development Administration

RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

(July 1, 1974 to December 31, 1977)

TEXTS OF ASSEMBLY ACTIONS

RECOMMENDATION 75–1

LICENSING DECISIONS OF THE FEDERAL BANKING AGENCIES

(Adopted June 5–6, 1975)

Entry into banking is controlled on the Federal level by four agencies: the Comptroller of the Currency (for charters and branches of national banks), the Federal Home Loan Bank Board (for charters and branches of Federal savings and loan associations, and via the Federal Savings and Loan Insurance Corporation for account insurance for State-chartered savings and loan associations), the Board of Governors of the Federal Reserve System (for FRS membership and accompanying FDIC deposit insurance for State-chartered banks, and for branches of State member banks), and the Federal Deposit Insurance Corporation (for deposit insurance for State banks that are not FRS members, and for branches of such banks).

The statutes which confer these powers of approval over entry into banking and banking markets contain sketchy standards, or none at all, defining how the administrative authorities should exercise their judgment. The statutory void has not as yet been filled by the agencies themselves; none of them has adopted comprehensive statements of policy or meaningful rules of general applicability, though recently the Federal Reserve and FDIC have taken steps in this direction.

In acting upon such applications, the agencies usually do not hold hearings or issue reasoned opinions. As a consequence, little authoritative information is available concerning the policies the agencies follow in exercising their broad powers over entry into banking markets and in granting valuable authorizations to some applicants and denying them to others.

Increasingly, within the last two decades, these decisions—particularly those of the Comptroller—have been subjected to judicial review. The absence of adequate explanatory opinions by the agency has impeded review that is both meaningful and limited. Reviewing courts have too often been forced to choose between pro forma validation of agency action or substitution of the court's judgment for that of the agency.

This recommendation, addressed to the agencies, is directed at the point of greatest initial need: the provision of explanation of policies and decisions. That can be accomplished in a variety of ways, and the recommendation distinguishes between different agency roles and types of decision, in a manner intended to avoid unnecessary demands upon agency resources. Moreover, the Freedom of Information Act (5 U.S.C. § 552) requires agencies to make available to the general public whatever statements of agency policy and opinions in individual cases they have prepared. This recommendation is in furtherance of those statutory objectives.

Applications are sometimes, though not often, rejected on grounds that the agency believes would be substantially injurious to a bank or individual if made public. This possibility is not a justification for a general policy of nonexplanation; it should not be automatically applied to shield all negative information. Occasionally, nevertheless, the agency may believe that it would be warranted in not disclosing certain information. If the information pertains to the applicant bank or group, the applicant could be afforded the option of withdrawing its request; if it pertains to an objecting bank, the ground could be stated in general terms, such as "to prevent an adverse impact on other institutions." The extent to which supporting evidence should be revealed in camera or by some other confidential method, if judicial review were subsequently sought, is left to be decided under existing law and is outside the scope of this recommendation.

The present recommendation has limited reach. It is not intended to express either approval or disapproval of the present system of entry controls in banking, nor is it addressed to the extent of statutory discretion possessed by the Federal banking agencies in their licensing decisions, which is exceptionally broad and would remain so if this recommendation were fully accepted. What is now proposed is, simply, that when this broad discretion is exercised, the agencies should articulate their decisional standards and underlying policy objectives in a way that would facilitate understanding and evaluation on the merits.

Recommendation

1. *General.* The Federal banking agencies should undertake to provide a full statement of their objectives in approving or denying applications for charters, membership, or permission to establish branches, and should define in concrete terms the standards to be applied. This can be done best by the adoption of policy statements and rules of general applicability, which should be as specific as possible. To provide additional clarity and understanding, reasoned opinions should be issued in situations described below.

2. *Chartering authority decisions: Comptroller and Federal Home Loan Bank Board.* Charter decisions are of high importance and relatively low in number. An explanatory opinion should be furnished as a matter of course in all charter denials, since this is the most critical

entry barrier; when requested, explanation of favorable action upon an application should be provided to any objecting party or to any interested Federal agency.

In the case of branch applications, the numbers are large and many approvals seem a matter of routine. Probably only a small minority of approvals, but a much larger fraction of denials, would occasion a desire or need for explanation. For branches, therefore, the comptroller and FHLBB should furnish written opinions when the agency believes the case presents issues of general importance, or when requested by an applicant, an objecting party or an interested Federal agency.

3. *Secondary supervisor decisions: Federal Reserve Board, Federal Deposit Insurance Corporation, and Federal Savings and Loan Insurance Corporation.* Branch approvals by the FRB and FDIC seem well nigh automatic, no doubt because of reliance on the primary approval of other authorities, and an opinion requirement in all cases would be excessive. For branches, therefore, the FRB and FDIC should also furnish written opinions when requested or when the agency believes the case presents issues of general importance.

Membership applications may not fall wholly into the same category, though only the FSLIC has a significant rejection ratio. Written opinions should be furnished on request, which would presumably be made infrequently by others than disappointed applicants.

4. *Publication.* All four agencies should systematically collect and publish their licensing opinions in some convenient form. Depending on frequency and length, those of general importance might be included as part of monthly publications such as the Federal Reserve Bulletin or Federal Home Loan Bank Board Journal, or as an appendix to annual reports; others might be published as a separate series and made available in public files at the agency's Washington and field offices.

RECOMMENDATION 75–2

AFFIRMATIVE ACTION FOR EQUAL OPPORTUNITY IN NONCONSTRUCTION EMPLOYMENT

(Adopted June 5–6, 1975)

Executive Order 11246, which concerns equal employment opportunity, applies to all contractors with the Federal Government. Pursuant to this Executive order, the Department of Labor has promulgated one set of regulations prohibiting discrimination and requiring affirmative action to govern contractors in the construction industry, and another set of such regulations to govern all other contractors.

A study of the application of the nonconstruction regulations to university faculty employment practices illustrates that the use of a single set of regulations for all nonconstruction employment can fail to take adequate account of important special circumstances of major employment categories. With respect to university faculty employment, for example, the regulations as applied have generated difficulties arising from failure to take account of the limited supply of qualified personnel in various disciplines, the nonquantifiability of standards for academic personnel, the diversity of institutional needs fulfilled by academic personnel (*e.g.*, research, teaching, public service), different types of institutions (*e.g.*, research universities, community colleges), and the concept of peer review in academic employment practices. It seems evident that difficulties of the sorts experienced in the application of the nonconstruction regulations to academic employment in higher education will be encountered in their application to other employment categories as well.

The study further suggests that contract cancellation is in many cases too severe or impracticable as the primary sanction for noncompliance with equal employment opportunity regulations; in practice, cancellation is rarely used. The more common sanction, as in the field of higher education employment, is the declaration of nonresponsibility of an employer. Unlike the procedures leading to other sanctions, such as debarment of a contractor or cancellation of a contract, no opportunity for prior hearing is afforded in connection with a declaration of nonresponsibility. The provision of an opportunity for hearing before imposition of any sanction under the contract compliance program will tend to assure the fairness and reliability of administrative determinations and to encourage responsible and consistent application of policy.

Recommendation

1. The Department of Labor, in consultation with the compliance agencies, should promptly commence a review of the contract compliance program applicable to nonconstruction contractors to determine whether regulations more closely adapted to the characteristics of specific occupations or industries are required, considering especially: (1) variations in the susceptibility of types of employment to uniform or quantifiable methods of evaluating and predicting performance; and (2) variations in policies of recruitment and advancement and in other personnel practices.

2. The Department of Labor should develop a system of graduated sanctions for breach of the obligation contained in the equal employment opportunity clause of Government contracts, and should seek legislation to this end as may be necessary.[1]

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[1] In this connection the Department should consider Conference Recommendation 71-9: "Enforcement of Standards in Federal Grant-in-Aid Programs," and Recommendation 72-6: "Civil Money Penalties as a Sanction."

3. A sanction, including that of declaration of nonresponsibility on equal employment opportunity grounds made prior to the award of a contract, should not be imposed except after opportunity for a hearing (whether evidentiary or informal) at which the validity of the claim of breach, or assertion of nonresponsibility, and the appropriateness of the proposed sanction may be placed in issue.

4. In performing its responsibilities for contract compliance in higher education the Department of Health, Education, and Welfare should: (*a*) provide regional office staffs with uniform and clearly defined policies, (*b*) recruit and assign staff who are familiar with institutions of higher education for administration of the program in higher education, (*c*) consult widely with representatives of higher education institutions and other interested groups in developing and administering its compliance rules and policies, and (*d*) strengthen coordination of its administration of regulations applicable to higher education with other agencies having overlapping responsibilities, in particular the Equal Employment Opportunity Commission and the Wage and Hour Administration of the Department of Labor.

RECOMMENDATION 75–3

THE CHOICE OF FORUM FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

(Adopted June 5–6, 1975)

This recommendation states criteria for use by the Congress in determining the appropriate forum for judicial review of Federal administrative action.

The present forum for the review of most agency actions taken on formal evidentiary records is the court of appeals under specific statutory provisions. There are some exceptions. An important one concerns decisions of the Social Security Administration on claims of old-age, survivors', and disability benefits, which are reviewable in the first instance by district courts with subsequent recourse to the courts of appeals.

The jurisdictional picture is less clear with respect to informal administrative action, both notice-and-comment rulemaking and non-record adjudication.

Some recent statutes provide specifically for review by courts of appeals of rules of general applicability promulgated without an evidentiary hearing. There is much uncertainty, and conflicting authority, as to whether older statutes providing for direct appellate review of agency orders apply to such rules. In the case of agencies not subject to specific court of appeals review provisions, rules are ordinarily reviewed by district courts under the general review provisions of the Administrative Procedure Act.

Orders entered after nonrecord adjudications by agencies whose orders generally are subject to court of appeals review typically are reviewed in the courts of appeals, although there is some old and more-or-less neglected authority that casts doubt on the practice. Orders of other agencies entered after nonrecord adjudications are reviewed in the district courts under the general review provisions of the Administrative Procedure Act.

Legislation that conformed to the criteria set forth in this recommendation would not significantly alter the pattern described above but would clarify the pattern at its edges. Such legislation would eliminate the uncertainty and consequent needless jurisdictional litigation that have resulted from the ambiguity of existing statutory review provisions in their application to informal agency actions, rules, and orders. It would have the additional desirable effect, particularly important now because of the acute and increasing caseload pressure on the courts of appeals, of helping to avoid burdening these courts with administrative review cases that are less suitable for them than others.

This recommendation rests on three basic premises. First, direct review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy, as respects both litigants and the judicial system. The classic case for the courts of appeals is review of agency action taken on an evidentiary record. A second premise, however, is that direct review by the courts of appeals is not necessarily rendered unfeasible by the absence of such a record; the records generated by the processes of notice-and-comment rulemaking and of informal adjudication are frequently adequate to the purpose of judicial review and, also, can usually be supplemented without the necessity of a judicial trial. The third, and qualifying, premise is that review by the courts of appeals, even when review is of a purely appellate nature, or, if not so, can feasibly be conducted by the courts of appeals, is not invariably desirable. The courts of appeals, burdened by rapidly increasing caseloads that threaten the quality of their decisions, constitute a scarce resource that should be reserved, to the extent possible, for the resolution of issues of law or policy issues of major impact; administrative review cases that do not present such issues and that would not ordinarily reach the courts of appeals unless brought there initially should be assigned instead to the district courts.

Before the study on which the recommendation is based was made the Conference necessarily passed upon particular questions of choice-of-forum for judicial review in connection with individual studies and the recommendations emanating therefrom. Instances are Recommendations 72–6 (court of appeals review of civil money penalties prescribed on a record); 72–7 (district court review of non-record selective service preinduction orders); 74–3 (court of appeals review of mining claims decided on a record). The Conference has not caused these recommendations to be restudied in the light of the new criteria but believes that the recommendations remain appropriate.

Recommendation

1. Adjudications based on trial-type hearings and rules required by statute to be based on a hearing with a determination on the record should generally be made directly reviewable by courts of appeals. For certain types of formal administrative action, however, initial district-court review may be appropriate in the interest of conserving the scarce and overextended resources of the Federal appellate system. The district court should not be interposed unless the administrative action to be reviewed is of a type: (*a*) That rarely involves issues of law or of broad social or economic impact warranting routine review by a multimember court, and (*b*) such that district court review would significantly reduce the workload of the appellate courts. The latter condition is met only where the class of orders to be reviewed is numerous and, if reviewed initially by district courts, would infrequently give rise to further appeal.

2. For any class of formal administrative action that, even after initial district-court review, generates a large and burdensome volume of appeals, only a small proportion of which involve legal issues or issues of broad social or economic impact, Congress should consider the advisability of making appeals discretionary or of allowing appeals only upon certification by the district court. Under a system of discretionary appeals, leave to appeal, either by the agency or by an aggrieved party, should be granted only in cases where issues of law or of broad impact are involved.

3. Orders of the Social Security Administration with respect to claims for disability, health insurance, retirement, or survivors' benefits should continue to be reviewed in the first instance by district courts. If the volume of social security appeals increases as dramatically as projected, Congress should consider the advisability of placing appellate review on a discretionary basis.

4. Orders of the Department of Labor Benefits Review Board with respect to black-lung compensation claims under the Black Lung Act of 1972 are now subject to direct review by courts of appeals in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Congress should consider the advisability of providing for initial district-court review of such orders.

5. The appropriate forum for the review of rules promulgated pursuant to the notice-and-comment procedures of 5 U.S.C. § 553 should be determined in the light of the following considerations:

(*a*) Absence of a formal administrative record based on a trial-type hearing does not preclude direct review of rules by courts of appeals because: (*i*) compliance with procedural requirements of U.S.C. § 553, including the requirement of a statement of reasons for the rule, will ordinarily produce a record adequate to the purpose of judicial review, and (*ii*) the administrative record can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court.

(*b*) Direct review by a court of appeals is appropriate whenever: (*i*) an initial district court decision respecting the validity of a rule will ordinarily be appealed; or (*ii*) the public interest requires prompt, authoritative determination of the validity of the rule.

(*c*) Rules issued by agencies that regularly engage in formal adjudication and whose orders are subject by statute to direct review by the courts of appeals will normally satisfy the criteria of (*b*) above and in any event should be reviewable directly by the courts of appeals.

(*d*) Rules of other agencies that do not satisfy the criteria of (*b*) above should generally be reviewable in the first instance by the district courts.

6. (*a*) Informal administrative actions, other than rules, should generally be reviewable in the first instance by the district courts.

(*b*) The court of appeals is the appropriate reviewing forum for informal actions that, as a class, fulfill all of the following conditions:

(*i*) Typically involve issues of law or of broad social or economic impact;

(*ii*) Typically do not require an evidentiary trial at the judicial level to determine either the underlying facts or the grounds or evidence on which the agency based its action; and

(*iii*) Are either few in number or, if numerous, would in most cases be likely to reach the appellate courts eventually if reviewed initially by district courts. Informal orders issued by agencies that mainly engage in formal adjudication and the formal orders of which are now subject by statute to direct review by the courts of appeals will normally satisfy these conditions and should therefore be reviewable by the courts of appeals. There is, however, at least one exception. Informal, discretionary orders of immigration officials related to deportation, but not issued as part of any formal deportation proceeding, should continue to be reviewable in the first instance by the district courts.

7. Statutes that give courts of appeals jurisdiction to review informal orders or rules should contain provisions, similar to that now contained in the Administrative Orders Review Act, 28 U.S.C. § 2347,

authorizing transfer of proceedings to a district court where a factual issue requiring a judical trial is presented.

8. A Federal court which determines that it does not have jurisdiction of a judicial review proceeding should be authorized to transfer the proceeding, in the interests of justice and expedition, to a Federal court appearing to have jurisdiction.

Separate Statement of Malcolm S. Mason and Robert L. Trachtenberg

This is, we believe, the first time the Conference has chosen to make an important recommendation without obtaining in advance the views of the agency most affected and best informed. Paragraph 3 of the recommendation deals specifically with review of Social Security cases. Paragraphs 1 and 2 are more general, but the discussion focused primarily on Social Security cases and did not have the benefit of specific comment by the Social Security Administration.

In a recent 4-week period that seems representative, over 95 percent of the litigated Social Security cases turned on factual issues of disability. The other 5 percent turn on issues of law often of constitutional dimension; as to these it is neither desirable nor useful that the review process be encumbered by a screening at district court or appeal court level.

The disability fact cases come to the courts under a substantial evidence test with the benefit of analysis by several levels of agency staff, an administrative law judge and possible appeals council review of factfindings on which the agency at several levels and a district court have concurred; the likelihood of reversal is extremely small. In the few cases in which the agency appeals, it is, by set policy, seeking review of a case in which there is an issue of broad consequence and in which there is a conflict between a conclusion of the agency at several levels of administration and a district court; the likelihood of reversal is presumably increased.

The proposal for appeal limited by discretion of the appeal court, or worse, by the district court, is bad in principle and probably unnecessary. If considered at all it should be viewed with due attention to these principal differences. Despite large volume, appellate review is ordinarily as quick and undemanding as a discretionary screening would be. The multitiered appeal process has had a beneficial effect on the program.

We believe that section 3, should have been deleted, particularly sentence 2 of section 3 and sections 1 and 2 should have been reconsidered in the light of that deletion to avoid reliance on impressions about Social Security cases without the benefit of such guidance as advance consultation with the agency might have given.

Recommendation 75-4

PROCEDURES TO INSURE COMPLIANCE BY FEDERAL FACILITIES WITH ENVIRONMENTAL QUALITY STANDARDS

(Adopted June 5-6, 1975)

The Federal Government owns or operates over 20,000 facilities, ranging from huge military establishments, national parks, and systems of prisons and veterans' hospitals to individual fish hatcheries, Coast Guard stations and research laboratories. All of these facilities are required by Federal laws to comply with environmental quality standards established by National, State, or local law.

As part of the Federal environmental protection program, a 1973 Executive order directs Federal agencies to assess their pollution control needs, develop plans for improvement and submit those plans and necessary budget requests for inclusion in the President's annual budget. This program has achieved significant results. Approximately $2.4 billion has been expended over the past eight years to improve and install pollution abatement equipment at Federal facilities. Nonetheless, instances of noncompliance by Federal facilities have persisted. Moreover, there are wide variations among the respective programs concerned with air, water, noise, solid waste, and ocean dumping, in the openness and effectiveness of the procedures for securing Federal facility compliance.

The Clean Air Act, the Federal Water Pollution Control Act, and the Noise Control Act each require agencies with control over Federal facilities to comply with both Federal and non-Federal pollution control standards "to the same extent (as) any person," unless otherwise exempted by statute. The Marine Protection Act requires all persons, including Federal officials, to obtain a Federal permit before dumping waste material in the ocean. Under the Solid Waste Disposal Act, Federal agencies need comply only with the U.S. Environmental Protection Agency's guidelines, which are less stringent than those of some States and localities.

The Federal air, water, noise control, and solid waste statutes do not establish or specifically authorize procedures for their enforcement where Federal facilities are concerned. This problem is acute when considering non-Federal environmental quality standards, which constitute the bulk of the environmental standards Federal facilities must meet, because the non-Federal efforts to impose their enforcement procedures have been challenged by Federal agencies. Two U.S. Courts of Appeals have reached opposite conclusions concerning the authority of States to require Federal facilities to obtain air emission control permits required of all non-Federal sources of air pollution; a third court of appeals has held that Federal facilities must comply with State permit requirements with respect to water quality. But any decision, even of the Supreme Court, will leave substantial procedural problems. If the authority of the States to impose their permit and other enforcement procedures upon Federal facilities is upheld, some agencies will have to comply with a multitude of different State and local procedures. Because of the insufficiencies of the statutory provisions, a result denying such authority to the States, would leave only the present fragmentary and ineffective Federal procedures to insure the compliance of Federal facilities with environmental quality standards.

Recommendation

1. (*a*) The Clean Air Act, the Noise Control Act, and the Federal Water Pollution Control Act should be amended to vest in a single Federal agency the exclusive authority to develop and administer procedures to insure compliance by Federal facilities with non-Federal environmental quality standards. That agency should consider the use of emission control permits where they are not now employed.

(*b*) If the Congress amends the Solid Waste Disposal Act to require that Federal facilities comply with non-Federal environmental quality standards, the amendment should vest in the single Federal agency referred to in paragraph (*a*) the exclusive authority to develop and administer procedures for compliance with such standards by Federal facilities.

2. Procedures employed to insure compliance by Federal facilities with State, interstate, and local environmental quality standards should provide for: (*i*) local public notice and notice to local officials; (*ii*) opportunity for a public hearing (but not for a trial-type hearing except on issues of specific fact that the agency finds may best be resolved by trial-type hearing); and (*iii*) authority for the presiding officer at any such hearing to make recommendations concerning compliance.

RECOMMENDATION 75–5

INTERNAL REVENUE SERVICE PROCEDURES: THE AUDIT AND SETTLEMENT PROCESSES

(Adopted December 11–12, 1975)

(a) *Individual agent's requisition of returns of audit.* The Internal Revenue Service should amend its procedures whereby an examining officer requisitions a tax return for the purpose of audit. The procedures should assure that the examining officer will make an adequate written explanation of his need to have the file, and that such explanation accompany the requisition and be reviewed by the requesting officer's Group Manager. For returns that are requisitioned for reasons so routine as to make detailed written explanation unnecessary, however, a code number designating the reason for selection in each case should suffice. The categories of routine reasons for requisition should be specifically and narrowly defined in the Internal Revenue Manual.

(b) *Notification of reasons for selection for audit.* (1) Each individual taxpayer should be given, at the time he is notified of the selection of his return for audit, a brief written statement of the selection program or other criterion on the basis of which his return was selected for audit. To the extent feasible, the selection of returns for audit should be made pursuant to programs and criteria established in advance.

(2) The Internal Revenue Service should annually publish statistics, by income level, showing the number of returns examined, the results of the examinations, and other pertinent information, for each of its selection programs and criteria.

(c) *Repetitive audits.* The Internal Revenue Service should establish the following procedures to be observed with respect to an individual who has undergone one or more audits with respect to the three preceding taxable years resulting in no change or only small change in his tax liability:

> (1) The district office's Returns Program Manager should not assign that individual's return to an audit group unless it is accompanied by an adequate file reflecting such recent audit experience.
>
> (2) Before contacting the taxpayer, the Group Manager and the examining officer should carefully review the current return in light of the taxpayer's past audit history to determine whether the issues presented by the current return are similar to those of prior audits. If they are, the current year's return should not be further examined unless there is compelling reason to believe that a substantial tax change will result.
>
> (3) When it is decided that the return should be further examined, then, before the examining officer commences his review of the taxpayer's books and records, the taxpayer should be informed in writing that he may inquire about the necessity for this repetitive audit.

Taxpayer Compliance Measurement Program (TCMP) audits should not be subject to the foregoing procedures.

(d) *Review of audit selection.* The Internal Revenue Service should carry out a systematic ongoing evaluation of its selection of taxpayers' returns for audit. It should at a minimum maintain procedures whereby the reasons for audit selection, as indicated by Service personnel on Forms 1247 (Examination Record) or 4298 (Audit Requisition and Information Report), can be verified for appropriateness and accuracy. The procedures established should be sufficient to enable the Joint Committee on Internal Revenue Taxation or other Congressional oversight body to obtain listings of all or a specified portion of the returns selected for audit, identified by any of the following characteristics: Taxpayer name and identification number; return document locator number; specific (coded) reason for selection; year for which return was filed; date of audit selection; and date of audit completion.

(e) *Staffing for TCMP audits.* To minimize the time of taxpayers and of Service personnel devoted to the income tax aspects of the Taxpayer Compliance Measurement Program (TCMP), the Internal Revenue Service should select from among its most capable and experienced Revenue Agents and Tax Auditors the personnel to conduct TCMP income tax audits and related research projects.

(f) *Advice to taxpayers regarding retention of records.* The Internal Revenue Service should annually endeavor to inform each taxpayer: (1) that an audit of his return, should there be one, will not likely commence for some period of time after the return has been filed; (2) that the taxpayer should retain, for use in case of audit, a copy of his return and all records which support the return for at least three years following the time fixed by law for its filing; and (3) that his receipt of a refund, based on the calculations in the tax return, does not preclude audit of that return at a later time. This recommendation could be fulfilled, for example, by presenting such information prominently in the Commissioner's annual message or elsewhere in the instruction materials accompanying the forms mailed to taxpayers.

(*g*) *Measurement and promotion of voluntary compliance.* The Internal Revenue Service should seek funds from the Congress to undertake studies to evaluate the effectiveness of methods to measure and promote voluntary compliance with the tax laws of the United States. Such inquiries should include consideration of return selection methods, audit procedures, collection procedures, programs for the education of taxpayers, and taxpayer assistance services.

(*h*) *Analysis of recovery experience.* The Internal Revenue Service should periodically publish a comparative study, for each taxpayer class, of a representative sample of District and Appellate Conference settlements involving the most commonly controverted issues. The study should include comparison and analysis of the recovery ratio (i.e., the ratio of the amount of deficiency agreed upon by the parties to the amount of deficiency originally recommended by the examining officer), with reference to the factors of: (1) amounts of tax involved; (2) whether or not the taxpayers were represented; and (3) patterns of geographic variation.

RECOMMENDATION 75-6

INTERNAL REVENUE SERVICE PROCEDURES: COLLECTION OF DELINQUENT TAXES

(Adopted December 11-12, 1975)

(a) *Notices mailed to delinquent taxpayers.* The Internal Revenue Service should revise its methods of notifying taxpayers of the application of forcible collection powers to collect delinquent accounts:

(1) The Service should experiment with sending its Final Notice Before Seizure by certified mail, return receipt requested, before forcible collection action is initiated.

(2) The Final Notice Before Seizure should be revised to indicate that forcible action may be taken at any time after the expiration of ten days from date of the Notice and to emphasize that such action may thereafter be taken without further notice to the taxpayer.

(3) If no levy or seizure action is initiated after an unusually long interval, such as 120 days, after the date of a Final Notice Before Seizure, the District Office should undertake additional actual notification to the taxpayer that levy or seizure will follow promptly, but not sooner than ten days thereafter. Such additional notification should be attempted by telephone or personal contact, and if no contact is established, by certified mail, return receipt requested.

(b) *Income tax liens.* In connection with the recording or filing of income tax liens, the Internal Revenue Service should establish and promulgate in the Internal Revenue Manual:

(1) Factors to be considered in determining whether such liens are to be recorded or filed;

(2) Procedures to ensure, to the extent feasible, that the taxpayer is notified of the recording or filing of such lien against his property; and

(3) Procedures to ensure, without the necessity of application by the taxpayer, that upon payment or satisfaction of a delinquent account, a release of such lien is properly recorded or filed in all places where notice of such lien was recorded or filed.

(c) *Levies on liquid assets.* (1) The Internal Revenue Service should establish and promulgate in the Internal Revenue Manual affirmative and specific guidelines for resort to levies on liquid assets (in addition to specifying, as it now does, when these powers should not be used) in order to achieve fair and evenhanded application thereof. In formulating such guidelines, the Service should by illustration seek to specify the circumstances in which the debtor is provided a "reasonable" opportunity to pay the tax and which constitute "judicious" use of the levy powers.

(2) In order to reduce the possibility of undue or unanticipated hardship to delinquent taxpayers against whom salary or wage levies are imposed, legislation should be enacted to exempt from levy a minimum amount of the taxpayer's salary or wages, such amount to be based in part upon the number of dependents of the taxpayer. Such legislation should also provide that a levy on salary or wages of a taxpayer be continuous from the date the levy is first made until the tax liability with respect to which it is made is satisfied or becomes unenforceable because of the lapse of time.

(d) *Seizures and sales of nonliquid assets.* (1) The Internal Revenue Service should establish the following procedures to ensure that the taxpayer is injured as little as possible by the seizure and sale of nonliquid assets, consistent with collection of the delinquent taxes:

(i) Withdrawal from Revenue Officers and delegation only to Group Managers of the authority to determine that seizure will be imposed;

(ii) Determination by the Group Manager, prior to imposition of the seizure, that the proceeds of sale of the seized assets will exceed the anticipated expenses of sale;

(iii) Return to the taxpayer of any item of property as to which a determination can reasonably be made that the minimum sale price is unlikely to exceed the Service's expenses of seizure and sale.

(2) To provide qualitative information concerning seizures and sales of nonliquid assets, the Internal Revenue Service should from time to time collect, tabulate, and analyze data on:

(i) The number of seizures, as it now does;

(ii) The number of sales;

(iii) The gross proceeds from sales;

(iv) The funds applied in reduction of tax liabilities;

(v) Personnel and other overhead costs incurred by the Service in the seizure and sale proceedings;

(vi) The number of releases back to the taxpayer of seized property; and

(vii) The reasons for such releases.

(e) *Undue hardship.* The Internal Revenue Service should continue to exempt from levy or seizure those taxpayers to whom undue hardship would result from such activity. However, the Service should establish and promulgate more specific criteria and procedures to make the application of the undue hardship principle more uniform. These should include:

(1) A listing of criteria for exempting funds sufficient for the purchase of common necessaries of life for the taxpayer and his dependents, including food, housing, transportation, and clothing;

(2) Clear advice as to what information and documentation is needed for the Service to make the determination of hardship; and

(3) Sufficient time and opportunity for the taxpayer to obtain the information and documentation necessary to complete and support the financial statement on which the determination will be based.

(*f*) *Installment payments of delinquent taxes.* The Internal Revenue Service should establish and promulgate in the Internal Revenue Manual procedures to enable taxpayers to pay their delinquent accounts in installments in appropriate circumstances. The Service should endeavor to ensure that the monthly sum of installment payments required of the taxpayer towards liquidation of his delinquent account does not exceed the amount of the taxpayer's monthly take-home income less his monthly expenses for common necessaries of life. The Service should keep line personnel advised of the minimum acceptable installment in order that the costs to the Service from processing any such payments do not exceed the sum of any such payment. No payment agreement should be rejected solely because of the length of time it would require to satisfy the debt; however, waiver or extension of the statute of limitations for collection should be obtained if the time needed for payment will extend beyond the limitations period, and the agreement should be subject to at least annual review and adjustment to reflect changes, if any, in the taxpayer's ability to liquidate the unpaid delinquency. Finally, the Service should discontinue any reference to agreements for payment of delinquent taxes in periodic installments as "part payment" agreements because such terminology fosters the mistaken impression that a portion of the tax debt has been forgiven. The idiom of "part payment agreement" should be supplanted with such terms as "installment agreement," "periodic payments," or others which do not connote that less than the total delinquency is to be paid.

(g) *Jeopardy and termination assessments.* (1) In order to prevent abuse of the authority to make jeopardy and termination assessments, the Internal Revenue Service should establish and promulgate procedures that will enable the taxpayer to contest the necessity and amount of such assessments at the earliest possible time. The taxpayer should be furnished as soon as practicable after the assessment is made a full written explanation of the facts upon which (i) the District Director found that collection of a tax deficiency is or has been jeopardized; and (ii) the computation of tax was based (including the method of such computation). An informal conference should be granted at the taxpayer's request to resolve any dispute over the finding of jeopardy and computation. The investigating agents who developed the facts upon which the finding of jeopardy and the computation of tax was based, and their supervisors, should ordinarily be in attendance at such a conference.

(2) In order to restrict the imposition of jeopardy and termination assessments to situations in which the eventual collection of tax is jeopardized, the Internal Revenue Service should remove the implication, now present in the Internal Revenue Manual, that jeopardy or termination assessments are justified merely by the existence of a "prima facie case" and make clear in the Manual that no such assessment may be imposed unless a determination has been made by the District Director, based on substantial evidence, that a tax is due and the eventual collection of the tax is jeopardized.

(3) The Internal Revenue Service should establish and promulgate in the Internal Revenue Manual procedures which will ensure immediate release to the taxpayer of any or all property distrained in jeopardy and termination proceedings in return for an adequate surety in the amount of the net proceeds expected to be realized on a forced sale of any or all such property the release of which is sought.

(h) *Employer tax payments.* To permit more prompt contact with defaulting business taxpayers, the Internal Revenue Service should speed its crediting of employer payments of withheld employee income and Social Security taxes by requiring commercial banks to forward records of such payments directly to an Internal Revenue Service Center, rather than to a Federal Reserve Bank.

(*i*) *Education of new employers.* The Internal Revenue Service should endeavor to give officers of new businesses written advice of their possible personal liability for payment of withheld employee taxes. This advice could be communicated individually to all such officers, whose names and addresses the Service could require to be submitted as part of the application for an employer identification number. Alternatively, the Service could send multiple copies of the advice letter to the new business entity, with the request that the copies be distributed to all officers. In either case the letter should invite the officer to discuss any questions with a Taxpayer Service Representative. When officers do respond and it is determined that there is a responsibility to pay and file returns of certain taxes, a follow-up contact should be made to ascertain that the responsibilities are understood and followed. Moreover, the Service should work with other Federal agencies to assure that the officers of new employer organizations being established with Federal financial assistance will become familiar with their responsibilities before they commence operations. Similar efforts, with the cooperation of parent organizations, should be made to contact and instruct franchisees and licensees of chain stores, food outlets, oil companies, and the like.

Recommendation 75–7

INTERNAL REVENUE SERVICE PROCEDURES: CIVIL PENALTIES

(Adopted December 11–12, 1975)

(a) *Analysis of Effectiveness of Civil Penalties.* The Internal Revenue Service should annually compile and publish, for each taxpayer class and by year of tax returns, statistical data, together with analytic discussions, pertaining to the assessment and collection of civil penalties for underpayment of tax due to each of the different types of conduct now or hereafter provided as the basis for such penalties. Such data should be compiled for the purpose of evaluating the significance, effectiveness, and fairness of these civil penalties and should include: (1) the number and dollar amounts of penalties assessed; (2) the number and dollar amounts of penalties voluntarily paid by taxpayers; (3) the number and dollar amounts of penalties contested by taxpayers; (4) the number and dollar amounts of penalties sustained by court action and collected. In addition to making such data and analyses available to the public and to the Congress, the Service should consider and determine whether additional data and analyses should be compiled and prepared pertaining to the significance, effectiveness, and fairness of these and other civil penalties from the standpoint of the administration of the tax laws by the Service, enforcement of the laws by the courts, and compliance with the laws by taxpayers.

(b) *Structure and Application of Civil Penalties for Underpayment of Tax.* Legislation should be enacted which would restructure and alter application of the civil penalties for underpayment of tax, established in Section 6653 of the Internal Revenue Code, as follows:

> (1) (i) The penalty for "negligence" should be retained. Negligence should be defined as failure to exercise reasonable care in keeping records or in preparing the tax return.
>
> (ii) A taxpayer against whom this penalty is assessed should have the burden of proof to establish by a preponderance of the evidence that his conduct was not negligent.
>
> (2) The present five percent penalty for "intentional disregard of rules and regulations (but without intention to defraud)" should be repealed.
>
> (3) (i) A new penalty should be established for "reckless or intentional conduct (but without willful attempt to evade payment of tax)." The rate of this penalty should be fixed at a level near the midpoint (say 25%) between the rates of the penalties for negligence (now 5%) and for willful attempts to evade payment of tax (now 50%). Reckless conduct should be defined as meaning that in keeping records or preparing the tax return, the

taxpayer has consciously disregarded a substantial risk that an underpayment would occur; provided, that it is not intended that the penalty to be established pursuant to this paragraph would apply to an underpayment resulting from a bona fide disagreement with the Internal Revenue Service as to the interpretation of the tax law or its application to facts disclosed on a tax return. Intentional conduct should be defined as meaning that in keeping records or preparing the tax return, the taxpayer knew that an underpayment would occur or was substantially certain to occur.

(ii) A taxpayer against whom this penalty is assessed should have the burden of proof to establish by a preponderance of the evidence that his conduct was not reckless or intentional. In any case where the taxpayer succeeds in persuading the court that his conduct was not reckless or intentional, the court should be empowered to impose the lesser penalty for negligence, even though it had not theretofore been assessed by the Internal Revenue Service.

(4) (i) The present 50 percent penalty for "fraud" should be restated to apply only to "willful attempt to evade payment of tax," which should be understood to have the same meaning as under Section 7201 of the Internal Revenue Code.

(ii) The Internal Revenue Service should have the burden of proof to establish by clear and convincing evidence that an underpayment is attributable to the taxpayer's willful attempt to evade payment of tax. If the Service succeeds in persuading the court that a part of the underpayment is so attributable, the burden of proof should shift to the taxpayer to establish by a preponderance of the evidence that the remainder of the underpayment is not so attributable. In any case where the court is not persuaded that the taxpayer engaged in a willful attempt to evade payment of tax, the court should be empowered to impose the penalty for reckless or intentional conduct (proposed in c. above) or the penalty for negligence, provided that, before the court may impose either of such lesser penalties, the Service shall have so proposed and the taxpayer shall have had the opportunity to present evidence to establish that he is not liable therefor.

(5) In imposing the penalties for underpayment of taxes described above, each penalty rate should be applied only to the portion of the total underpayment that is attributable to conduct liable for penalty at such rate.

(c) *Publicity of Civil Penalty for Underpayment of Tax Because of Fraud.* The Internal Revenue Service should seek statutory instruction with respect to publicizing the imposition of the 50 percent civil penalty for underpayment of tax because of fraud (or, as recommended in paragraph (b)(4) of this section, restated as "willful attempt to evade payment of tax").[1]

(d) *Structure and Application of Civil Penalties for Failure to File Tax Return or to Pay Tax.* (1) Legislation should be enacted which would restructure and alter application of the civil penalties for failure to file a tax return or to pay a tax, established in Section 6651 of the Internal Revenue Code, as follows:

(i) The phrase "and not due to willful neglect" should be deleted from paragraphs (1), (2), and (3) of subsection 6651(a).

(ii) (A) The monthly rate of the penalty for failure to file a return, established in subsection 6651(a)(1), should be modified so as to extend the time period of lateness in filing a return which must elapse before the rate of penalty to be applied reaches the present aggregate maximum rate of 25 percent. The table below sets forth three options for so modifying the monthly penalty rate, compared with present law.

	Penalty for first month (percent)	Penalty for each succeeding month (percent)	Period of lateness to reach maximum penalty (months)
Present law	5	5	5
Option 1	5	2	11
Option 2	5	1¼	16
Option 3	5	1	21

The penalty for failure to pay tax established by subsection 6651(a)(2) should be imposed in addition to, and not offset against, the foregoing penalty.

(B) The monthly rate of the penalty for each month after the first month of failure to file a return should be prorated on a semi-monthly basis.

(2) The Internal Revenue Service should set forth, in the regulations under Section 6651 of the Internal Revenue Code, or in other form readily available to the public, the listing of acceptable reasons for late filing of a tax return that are set forth in the Internal Revenue Manual.

(e) *Procedures for Appealing Civil Penalties for Failure to File Tax Return or to Pay Tax.* With regard to civil penalties for failure to file a tax return or to pay tax established in Section 6651 of the Internal Revenue Code, taxpayers should be accorded administrative settlement procedures and the right to Tax Court review similar to those accorded with regard to civil penalties for underpayment of tax established in Section 6653 of the Code.

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[1] Issuance of such publicity should be carried out in a manner consistent with Conference Recommendation 73-1, Adverse Agency Publicity.

RECOMMENDATION 75–8

INTERNAL REVENUE SERVICE PROCEDURES: TAX RETURN CONFIDENTIALITY

(Adopted December 11–12, 1975)

(a) *Purpose and Scope of Application of Recommendations.* (1) Under existing law, tax returns are disclosed by the Internal Revenue Service for many purposes to many governmental agencies outside the Internal Revenue Service. The purpose of these recommendations is substantially to narrow the authority of the Service to disclose to other governmental agencies tax returns pertaining to the tax liability of individuals and decedents, including principally individual income tax returns (Forms 1040 and 1040A), estate tax returns (Form 706), gift tax returns (Form 709), and income tax returns filed on behalf of estates or trusts (Form 1041). Tax returns of business entities such as partnerships and corporations, even though they may have bearing on the tax liability of individuals, are outside the scope of these recommendations. The omission of such other tax returns from the scope of application of these recommendations is intended to reflect neither approval nor disapproval of existing law or of the disclosure practices of the Internal Revenue Service thereunder, with respect to such other tax returns. But Congress, in addressing the subject of tax return confidentiality should make provision to govern the confidentiality and conditions of disclosure of all categories of tax returns, including categories that are outside the scope of these recommendations.

(2) As used in these recommendations, the term "tax return" means (i) the return itself together with any schedule, list, and other written statement filed by or on behalf of the taxpayer with the Internal Revenue Service which is designed to be supplemental to or become a part of the return, and (ii) other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included in paragraph (a)(2)(i) of this section.[1]

(b) *General.* Legislation should be enacted which would permit the disclosure of tax returns by the Internal Revenue Service only as authorized by express statute designating the persons to whom and the purposes for which disclosure may be made, the procedures governing such disclosure, and limitations on use or redisclosure that shall govern such disclosure.

(c) *Availability of Tax Returns to Executive Departments and Agencies.* (1) Legislation should be enacted which would permit the disclosure by the Internal Revenue Service of tax returns to any Executive department or agency of the Federal government in the following circumstances:

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[1] This definition is taken from Treasury Regulation § 301.6103(a)-1(3)(i). In considering any legislation in this area, Congress should consider the adequacy of this definition, since some technical problems may exist under the present regulation.

(i) To any office of the Treasury Department for use that is necessary to its exercise of responsibility for the administration of the tax laws, the formulation of tax policy, or the preparation of economic analyses.

(ii) To a United States Attorney, or to an attorney of the Department of Justice, for use in preparing for and conducting civil or criminal litigation that is related to administration of the tax laws, provided, that any such disclosure, shall be limited to (A) the tax return of the taxpayer who is a party to the litigation, (B) the tax return of an alleged co-conspirator of such party, and (C) the tax return of any other taxpayer which contains information that is pertinent to an issue on the litigation, and provided further, that when any such disclosure is to be made in response to a request initiated by any such attorney, the request shall be in writing and state with specificity the reasons for seeking the tax return.

(iii) To the Bureau of the Census and to the Bureau of Economic Analysis of the Department of Commerce for use that is necessary to their respective statistical collection and publication responsibilities.

(iv) To the Social Security Administration for use that is necessary to its responsibility for administering the Social Security Act.

(v) To the Department of Labor and to the Pension Benefit Guaranty Corporation for use that is necessary to their respective responsibilities for administering the Employee Retirement Income Security Act.

Particularly, the Internal Revenue Service should not be permitted to disclose tax return information to any Executive department or agency of the Federal government for use in any way relating to an individual's service as a juror. [The Conference defers consideration of whether, and under what circumstances, tax returns should be disclosed to Executive departments or agencies of the Federal government for use in litigation or investigations not related to the administration of the tax laws.]

(2) Any disclosure in a form that allows identification of the taxpayer should be made only if the agency or department to which disclosure is made follows procedures based on legally enforceable regulations no less restrictive than those of the Internal Revenue Service which are designed to assure that the tax return will not be used or redisclosed for any purpose other than that for which such disclosure is made.

(d) *Availability of Tax Returns to the Executive Office of the President.* (1) Legislation should be enacted which would permit the disclosure of tax returns by the Internal Revenue Service to the Executive Office of the President, only in accordance with the following limitations:

(i) The President shall personally sign a written request for such disclosure which (A) specifies the taxpayer's tax return to be disclosed; (B) designates by name a responsible individual to whom disclosure is to be made; (C) states with specificity the reasons for seeking the tax return and the uses to which it will be put; and (D) states that the tax return requested will not be reproduced and will not be used or redisclosed for any use other than that for which disclosure is requested.

(ii) The requested tax return shall be furnished by the Internal Revenue Service only in written form and only to the President or to an individual designated in the request.

(iii) The written material furnished by the Internal Revenue Service shall be returned to the Service after the use for which it was requested has been completed.

(2) The Internal Revenue Service should maintain permanent records of all disclosures of tax returns to the Executive Office of the President, including copies of Presidential requests, the dates and reasons therefor, the individuals to whom disclosure is made, and the dates when materials furnished are returned to the Service. Based on such records, the Internal Revenue Service should prepare and submit an annual report to the committees of the Congress which are charged with responsibility for oversight of the administrative procedures of the Service, of the names of all taxpayers about whom information was disclosed, the reasons for which each disclosure was requested, and the names of all individuals to whom such disclosures were made.

(e) *Availability of Tax Returns to Committees of Congress.* The existing statutory authority (Section 6103(d) of the Internal Revenue Code) for the Senate Committee on Finance, and the Joint Committee on Internal Revenue Taxation should be continued. Disclosure of tax returns by the Internal Revenue Service to any other committee of the House or Senate, or joint committee of the Congress, should only be in accordance with specific authorization for such disclosure by a resolution of the House or Senate or, in the case of a joint committee, by a concurrent resolution.

(f) *Availability of Tax Returns to States.* (1) Legislation should be enacted which would amend Section 6103(b) of the Internal Revenue Code by providing the following additional limitations on the right of any State official, body, or commission to inspect tax returns:

(i) The State shall have enacted a statute, which the Commissioner of Internal Revenue has determined to be substantially similar to paragraph (2) of Section 7213 of the

Internal Revenue Code, making it a crime for any officer, employee, or agent of the State, or of any political subdivision thereof, to disclose any information acquired by him as a consequence of a disclosure made by the Internal Revenue Service pursuant to Section 6103(b) of the Internal Revenue Code.

(ii) The State shall have entered into, and shall fully comply with, an agreement with the Internal Revenue Service by which the State is obligated to adopt legally enforceable regulations and procedures to safeguard the confidentiality of tax returns which are determined by the Internal Revenue Service to provide satisfactory assurance that (A) information disclosed by the Service to the State, pursuant to Section 6103(b) of the Internal Revenue Code, and (B) information, submitted by a taxpayer to the State or local tax authorities, which is the same as or substantially similar to that compiled for submission with the taxpayer's federal income tax return, will be used or disclosed only within the limitations therein provided.

(2) The Internal Revenue Service should adopt regulations which shall contain provisions to accomplish the following:

(i) Establish procedures whereby (A) the Service will make the determination that a State has enacted a statute that is substantially similar to paragraph (2) of Section 7213 of the Internal Revenue Code, and (B) the Service will monitor the State's enforcement of such statute;

(ii) Establish criteria that will be applied by the Service in making determinations regarding the sufficiency of State regulations and procedures designed to limit use and redisclosure of information to be disclosed pursuant to Section 6103(b) of the Internal Revenue Code;

(iii) Establish criteria that will be applied by the Service in acting upon requests for disclosure of information pursuant to Section 6103(b) of the Internal Revenue Code; and

(iv) Establish procedures whereby the Service will audit and enforce the performance by the States of their obligations provided in agreements entered into as a condition of obtaining disclosure of information pursuant to Section 6103(b) of the Internal Revenue Code, including a procedure for suspending disclosure of information to a State under Section 6103(b) whenever the Service determines that the State has failed to perform any of its obligations provided in such agreement.

(g) *Requisition of Tax Returns by Service Personnel.* The Internal Revenue Service should strengthen its procedures designed to eliminate unnecessary inspection of tax returns by Service employees. Such procedures should provide for (1) periodic monitoring by Service management of the requisitioning of tax returns by Service employees,

(2) preparation and maintenance of statistical records designed to reveal patterns of frequency in, and of reasons for, the requisitioning of tax returns by Service employees, and (3) preservation of the documents employed by Service employees to requisition tax returns by incorporating each such document in the permanent file of the return requisitioned thereby.

(h) *Notice to the Public About Tax Return Disclosures.* The Internal Revenue Service should inform each taxpayer, by means of a concise statement in the tax return or other appropriate place, of the disclosure, for uses unrelated to the administration of Federal tax laws, that may be made of information supplied by the taxpayer in the return. Such statement should include reference to a public document, which should be prepared and disseminated by the Service, which identifies the governmental agencies and other persons to which disclosures of tax returns are made and the purposes for such disclosures, and which fully describes the procedures followed by the Service with respect to the disclosure of tax returns.[2]

AMENDMENT TO RECOMMENDATION 75-8

TAX RETURN CONFIDENTIALITY

(Adopted June 3-4, 1976)

(b) *General*

(1) Legislation should be enacted which would permit the disclosure of tax returns by the Internal Revenue Service only as authorized by express statute designating the persons to whom and the purposes for which disclosure, and limitations on use or redisclosure that shall govern such disclosure.

(2) Legislation should be enacted which would provide that tax returns pertaining to the tax liability of individuals and decedents are confidential and, except as specifically authorized by statute, shall not be disclosed by the Internal Revenue Service to the general public, or any individual member thereof, either at the initiative of the Internal Revenue Service or in response to a request for disclosure made to the Service by any member of the general public, provided that such prohibition shall not prevent disclosure by the Service of any tax return of an individual or a decedent upon a request duly made by such individual or his authorized representative or by the authorized representative of such decedent.

(3) Legislation should be enacted providing, as a general limitation on all tax return disclosure authority conferred on the Internal Revenue Service, that in making any authorized disclosure of a tax return to any person other than the taxpayer to whom the return pertains,

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[2] This recommendation might be implemented by amplification of the Privacy Act notification provided with the 1975 income tax returns.

the Service shall disclose no more information than is necessary to effectuate the purpose for which such disclosure is authorized and providing further that the Service shall establish administrative procedures designed to assure that every particular disclosure is made in strict accordance with the authority therefor and with such general limitation.

RECOMMENDATION 75-9

INTERNAL REVENUE SERVICE PROCEDURES: TAXPAYER SERVICES AND COMPLAINTS

(Adopted December 11–12, 1975)

(a) *Separate Accounting for Taxpayer Service Functions.* The Internal Revenue Service should, on a basis consistent from year to year, compile data on all personnel and funds allocated to and utilized in the performance of functions by its Taxpayer Service Division. Such data should be broken down, perhaps on the basis of statistical sampling, for each of the major types of taxpayer service provided, with attention to at least the following functions:

(1) Responding to individual inquiries and requests for assistance regarding administrative and operating procedures of the Service which have an impact on particular taxpayers;

(2) Answering individual inquiries for tax law advice and providing assistance in tax return preparation; and

(3) General education of members of the public about the tax laws, their tax-return-filing and tax-payment responsibilities, and the administrative and operating procedures of the Service.

(b) *Taxpayer Services.* The Internal Revenue Service should consider establishing a procedure whereby taxpayer inquiries and requests for assistance can be promptly screened and referred for response to Service personnel selected on the basis of their competence and authority to respond to particular categories of inquiry or assistance. Such a screening and referral system might be facilitated by:

(1) Developing statistical profiles of the categories of inquiry and requests for assistance that are most frequently made;

(2) Specifically training and assigning some personnel to review taxpayer inquiries and requests for assistance and to make referral of them to those Service personnel whose competence and authority will assure prompt and effective responses;

(3) Specifically training some personnel as specialists in the administrative and operating procedures of the Internal Revenue Service, with emphasis on the operation of Service Centers, to whom referral of inquiries and requests for assistance will be made;

(4) Continuing to make available experienced and knowledgeable Audit Division personnel to whom referrals of inquiries

and requests for assistance may be made, especially during tax-return-filing season; and

(5) Continuing to maintain high quality staffing of taxpayer contact units in the Service Centers until some workable alternative thereto is developed.

(c) *Tax Law Advice to Taxpayers.* The Internal Revenue Service should adopt procedures designed to assure that any taxpayer who inquires for tax law advice from any employee of the IRS Taxpayer Service Division will be informed that: (1) the answer to his inquiry is based on the facts understood by the employee and that such understanding may not be identical to, nor as comprehensive as, the taxpayer's; (2) the Service is not bound by the advice given by the employee and may assert a different position at some later date, for example, if the taxpayer's return is audited; (3) the advice given by the employee is based on the Service's interpretation of the tax laws and, if such be the case with respect to a particular inquiry, that there is authority for a different interpretaton as to which the taxpayer should seek his own tax law advice; and (4) the taxpayer should preserve any records pertaining to the subject matter of the inquiry for at least three years following the time fixed by law for filing the tax return to which the inquiry pertains. The substance of the foregoing information should be incorporated into all written materials issued by the Service describing the availability of taxpayer services or responding to inquiries for tax law advice. The substance of such information also should be mentioned in oral responses to inquiries for tax law advice, to the degree appropriate to the nature and circumstances of the contact.

(d) (1) *Taxpayer Complaint Response Procedures.* The Internal Revenue Service should establish regular procedures whereby any taxpayer can obtain a prompt and impartial response to any legitimate complaint about the conduct of any individual IRS employee. These complaint response procedures should be organized and operated so as to provide for the receipt and processing of such complaints by Service personnel who have thorough familiarity with the authority, organization, and administrative and operating procedures of the Service.

(2) The recommended complaint response procedures should be well publicized and easily accessible to taxpayers through all IRS personnel, however organized and wherever situated, whose responsibilities include the provision of assistance, advice, or other services to taxpayers (for example, Taxpayer Service Representatives and personnel of Service Center Taxpayer Contact Units).

(3) The recommended complaint response procedures should be designed and operated so as to provide information that will enable the line management of the Service systematically to:

(i) Identify the causes of all legitimate complaints about the conduct of individual IRS employees;

(ii) Assess the effectiveness of the complaint response procedures from the standpoint of taxpayers; and

(iii) Determine what changes, consistent with the Service's duty to administer the internal revenue laws, may be necessary in the training, supervision, or assignment of Service personnel to eliminate causes of legitimate complaints about the conduct of individual IRS employees.

RECOMMENDATION 75–10

INTERNAL REVENUE SERVICE PROCEDURES: THE IRS SUMMONS POWER

(Adopted December 11–12, 1975)

(a) *Information on the Summons.* The Internal Revenue Service should revise its Summons form (Form 2039) to delete extraneous language and references to particular statutes, regulations, or fact situations, and to include, preferably on its face, and in a prominent position and type style:

(1) A brief and specific description of administrative procedures available to the summoned party for raising objections to the summons or to questions propounded at the appearance; and

(2) A statement that if the summoned party fails to comply with the summons or fails to answer questions propounded, the Service may seek a court order to compel compliance, and that where the summoned party fails to appear or otherwise to comply with the summons willfully and without legal excuse, he may be subject to contempt proceedings or criminal prosecution.

(b) *Notification to Taxpayer of Summons to Third Parties.* At the time a summons is served on a third party requesting testimony or production of documents, or as soon as feasible thereafter, the Internal Revenue Service should transmit a copy of such summons to the person to whom such testimony or documents relate.

(c) *Management Monitoring of Use of Summons.* To assure better oversight by its management of the use of the summons by its officers and employees, the Internal Revenue Service should prepare and maintain statistics and analyses for each taxpayer class, to the extent possible, comprising the following data:

(1) Number of summonses issued;

(2) Classifications of employees issuing summonses;

(3) Number of summonses with which there is voluntary compliance;

(4) Number of summonses with which there is not voluntary compliance and for which it is decided not to seek judicial enforcement, together with the reasons for such decisions; and

(5) Number of summonses with which there is not voluntary compliance and for which it is decided to seek enforcement, together with the reasons for such decisions, whether judicial enforcement is granted or denied, and the reasons for denial of enforcement.

RECOMMENDATION 76–1

EXCEPTION FROM MANDATORY RETIREMENT FOR CERTAIN PRESIDENTIAL APPOINTEES

(Adopted June 3–4, 1976)

The Civil Service Retirement Act subjects Federal employees to mandatory retirement at age 70 and upon completion of 15 years service, 5 U.S.C. § 8335 (1970). Under 5 U.S.C. § 8335(c), the President has broad discretionary power to exempt employees from mandatory retirement.

This recommendation takes no position as to whether as a matter of personnel administration a policy of mandatory retirement for Federal employees at age 70, coupled with authority to make exceptions in appropriate cases, is desirable. However, as applied to those officers of the Executive branch who are appointed by the President with the advice and consent of the Senate the provisions of section 8335 are awkward and inappropriate. Such officers serve either for an indefinite term at the pleasure of the President, for a definite term but nevertheless at the pleasure of the President, see, e.g., 28 U.S.C. § 541, § 561; or for definite terms under statutes which limit the President's removal power in order to preserve the officers' independence from Executive direction and control.

Where the officers serve at pleasure, the provisions of section 8335 impose a restraint, albeit minor, on the President's appointment power, and are unnecessary to his supervisory responsibility over the execution of the laws. However, they may have occasional value, where the officer's term is otherwise indefinite, in compelling consideration of the continued suitability of a longtime incumbent. Where the officer serves at pleasure but for a definite term, even this advantage largely disappears. Where the officers do not serve at pleasure, as in the case of the members of the independent regulatory commissions, the application of section 8335 is inconsistent with the goal of agency independence and a potential source of embarrassment to the officer, the agency and the President.

Recommendation

Congress should amend 5 U.S.C. § 8335(d), which contains exceptions to the mandatory retirement provisions, to add a new exception for employees appointed by the President with the advice and consent of the Senate to serve for a definite term of years.

Separate Statement of Kenneth Culp Davis

The theory behind the recommendation is that presidential influence on formal adjudication is harmful. Yet no single case was brought to the attention of the Conference in which such influence had been found to have been harmful.

Even if the theory could be supported with facts, Congress clearly should not act on the recommendation without considering a question the Conference did not consider: Which are more important—the dozens of cases per year that could be affected by adoption of the recommendation, or the tens of thousands per year decided in executive departments under cabinet officers who serve at the will of the President and are therefore subject to direct presidential influence?

I could join in a recommendation reaching tens of thousands of cases and neglecting dozens, but I cannot join in a recommendation reaching dozens and neglecting tens of thousands.

Furthermore, I think the arrangement Congress has provided for the tens of thousands is working satisfactorily, and many other questions about the administrative process are far more deserving of attention both by the Conference and by Congress.

RECOMMENDATION 76–2

STRENGTHENING THE INFORMATIONAL AND NOTICE-GIVING FUNCTIONS OF THE FEDERAL REGISTER

(Adopted June 3–4, 1976)

The primary role of the Federal Register is the publication, as required by the Federal Register Act and the Administrative Procedure Act, of legal documents that affect people generally, such as descriptions of agencies' organization and functions, texts of substantive and procedural rules, notices of proposed rulemaking, and statements of general policy or interpretations of general applicability formulated and adopted by agencies. The Office of the Federal Register serves as an official depository for the filing of these documents, and their publication in the Federal Register provides the public with notice of their contents. Paragraphs A and B of the recommendation seek to strengthen this informational function of the Federal Register.

The secondary role of the Federal Register is the publication of notices pertaining to adjudicatory matters. Statutory requirements and agency practices with respect to the publication of these notices conform to no pattern but vary widely among agencies and among different types of adjudicatory proceedings. Since the establishment of the Federal Register, Congress has enacted a considerable number of statutes that specifically require agencies to publish in the Federal Register notices of applications, hearings, or decisions in adjudicatory proceedings. In addition, agencies have often obtained the approval of the Director of the Federal Register to publish in the Federal Register notices pertaining to adjudicatory matters despite the absence of an express publication requirement. Paragraphs C and D of the recommendation seek to define and strengthen this notice-giving function of the Federal Register.

Recommendation

A. Preservation of Documents in the Code of Federal Regulations

The Administrative Committee of the Federal Register should require each agency to the maximum extent practicable to preserve in the Code of Federal Regulations documents of general applicability that are published in the Federal Register and are of continuing interest to the members of the public. Particularly, actions should be taken to the extent practicable in the following areas:

1. The Administrative Committee should act to preserve in the Code of Federal Regulations descriptions of each agency's organization and functions required to be published in the Federal Register under sections 552(a)(1) (A) and (B) of the Administrative Procedure Act. All agencies should inform the public of their organization and functions by publishing complete and informative descriptions in each year's edition of the Code of Federal Regulations. Subsequent changes in an agency's description of its organization and functions should appear in the Rules and Regulations section of the Federal Register where the codification system adopted for use in the Code controls the order of publication and provides a useful finding aid for subsequent developments.

2. The Administrative Committee and the agencies should act to preserve in the Code of Federal Regulations those statements of basis and purpose (or portions thereof) accompanying the publication in the Federal Register of newly promulgated rules that are of continuing interest to members of the public. If the preservation of an agency's basis and purpose statements in successive editions of the Code of Federal Regulations is likely to become cumbersome, the texts of the statements prepared by that agency during each preceding year should be reprinted only once in that year's edition of the Code of Federal Regulations, either at the end of the title or chapter assigned to the agency or in a special Code volume with statements from other agencies, so that subscribers to the Code are at least able to preserve the

statements in composite, bound form. Additionally, the annual editions of the Code of Federal Regulations should supply the Federal Register citations to pending rulemaking proceedings that affect present regulations or add new regulations.

B. Publication in the Federal Register of Statements of General Policy and Interpretations of General Applicability

Despite the requirement of section 552(a) (1) (D) of the Administrative Procedure Act that each agency currently publish in the Federal Register for the guidance of the public those "statements of general policy or interpretations of general applicability formulated and adopted by the agency," surprisingly few such policy statements and interpretations are in fact published in the Federal Register. Each agency should review its practices and take necessary measures to insure the publication in the Federal Register of all agency statements of general policy and interpretations of general applicability. In addition, when an agency utilizes an adjudicatory opinion or an instruction to staff for the purpose of adopting a general policy or interpretation of general applicability, it should publish in the Federal Register the pertinent portion of the opinion or of the instruction, or it should promptly summarize the policy or interpretation in guideline form and publish it in the Federal Register. These policy statements and interpretations should be published in the Rules and Regulations section of the Federal Register and should be preserved in the Code of Federal Regulations when they are of continuing interest to the public.

C. Standards for Publication in the Federal Register of Notices Pertaining to Adjudicatory Matters

Congress should consider the following standards in determining whether to impose new requirements for the publication of notices pertaining to adjudicatory matters and in reviewing existing publication requirements. The Director of the Federal Register should also observe these standards in exercising his discretionary authority to allow the publication in the Federal Register of notices pertaining to adjudicatory matters that are not required by law to be published. In both instances agencies should not rely solely on the publication of notices in the Federal Register to afford notice to interested persons of adjudicatory matters if other forms of public notice are practicable.

1. The Federal Register should not routinely be used to publish the texts of agency orders and opinions in adjudicatory proceedings or notices of those decisions if there is no further opportunity available for interested persons to comment or otherwise to participate in the proceeding, except when such publication serves a necessary legal purpose. Statements of general applicability adopted by an agency in an adjudicatory opinion should be published in the Federal Register

in accordance with paragraph B of this recommendation. Supplementary agency publications that contain the texts of agency orders and opinions in adjudicatory proceedings should be listed in the Code of Federal Regulations at the head of the applicable title or chapter assigned to the agency and should be described in greater detail in the agency's regulations published in the code.

2. The Federal Register should not be used to publish notices of applications, hearings, and other adjudicatory matters unless the notices are public notices intended to inform interested members of the public who are not parties to the proceeding of the opportunity to comment or otherwise to participate in the proceeding. In addition, specific categories of public notices (for example, notices of applications or hearings under a specific statutory provision) should not be published if there is no substantial public interest in the proceedings or if the publication of the notices in the Federal Register is unlikely to inform interested persons about pending adjudicatory proceedings of which they would not otherwise receive notice.

3. The various categories of public notices of each agency should be listed and described in detail in the agency's regulations in the Code of Federal Regulations. The descriptions should designate which public notices appear in the Federal Register and which do not.

D. Format for Publication in the Federal Register of Notices Pertaining to Adjudicatory Matters

1. The Administrative Committee of the Federal Register should act to require that notices pertaining to adjudicatory matters that are published in the Federal Register adopt an appropriate public notice format. The notice that appears in the Federal Register should briefly inform interested persons of the nature of the proceeding, the agency's legal authority, the matters of fact and law asserted, and the opportunities available to comment or otherwise to participate in the proceeding and should designate an agency official interested persons may contact for additional information. The published notice should not ordinarily contain the text of any agency order or opinion or a detailed recitation of the legal or factual contentions of the agency or other parties to the proceeding.

2. If a notice pertaining to an adjudicatory matter is published in the Federal Register, it should be published as early in the proceeding as practicable (e.g., at the time an application is filed rather than solely when the agency orders a hearing on the application). An agency may also highlight specific applications or hearings where public participation is particularly important by publishing notices thereof in the Federal Register even though the agency does not publish notices of other applications or hearings under the same statutory provision.

RECOMMENDATION 76–3

PROCEDURES IN ADDITION TO NOTICE AND THE OPPORTUNITY FOR COMMENT IN INFORMAL RULEMAKING

(Adopted June 3–4, 1976)

The Conference's Recommendation 72–5 stated that in rulemaking of general applicability involving substantive rules "Congress ordinarily should not impose mandatory procedural requirements other than those required by 5 U.S.C. § 553," and that "Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact." Paragraph 5 of the Recommendation recognized that agencies nevertheless may sometimes appropriately utilize such procedures for resolving issues of specific fact, and it counseled that in rulemaking proceedings of general applicability "each agency should decide in the light of the circumstances of particular proceedings whether or not to provide procedural protections going beyond" the notice-and-comment requirements of section 553, "such as opportunity for oral argument, agency consultation with an advisory committee, opportunity for parties to comment on each other's written or oral submissions, a public-meeting type of hearing, or trial-type hearing for issues of specific fact."

The present recommendation enlarges upon paragraph 5 of Recommendation 72–5 by further specifying for agency consideration certain procedures going beyond notice-and-comment, and by describing some of the "circumstances of particular proceedings" that should move agencies to consider such additional procedures.

The Recommendation grows out of a study of decisions, primarily of the Court of Appeals for the District of Columbia Circuit, in which rulemaking proceedings have been remanded to agencies for additional procedures, and of the responses of the affected agencies. The Recommendation implies no view as to whether those decisions were authorized by the Constitution or relevant statutes. The Recommendation is premised, however, on the view that one can learn from the insights of judges, who on the basis of their study of records reflecting "the circumstances of particular proceedings," perceived a need for procedures in addition to notice and the opportunity for comment, and from the experience of agencies required to provide such additional procedures.

Recommendation

1. Agencies should afford interested persons the opportunity to participate as effectively as possible in notice-and-comment rulemaking proceedings. Therefore, in order to enlarge the opportunity for public participation and increase its effectiveness, agencies in appropriate circumstances should utilize procedures such as the following, which go

beyond a single notice and opportunity to comment and supplement or particularize those listed as examples in Recommendation 72–5.[1]

a. Providing from the outset for the possibility of two cycles of notice-and-comment (i) when the agency anticipates that the issues raised by the rulemaking will be unusually complex, or (ii) when it is in the public interest to utilize the initial notice of proposed rulemaking to give only a general description of the subjects and issues involved in the proceeding and to invite public comment upon those subjects and issues; provided that at the conclusion of the first cycle the agency may take any action within its powers. In addition an agency may at any time announce, as by an "advance notice of proposed rulemaking", that it intends to issue a notice of rulemaking, and in such announcement solicit comments and suggestions with respect to the contents of such notice.

b. Providing for a second cycle of notice-and-comment or by notice providing an opportunity for additional comment in any proceeding when comments filed in the proceeding, or the agency's response to such comments, present new and important issues or serious conflicts of data. An agency should consider the desirability of responding to comments as a means of exposing the agency's tentative views in order to enhance the usefulness of further comments by the public.

c. Incorporating in the notice of a notice-and-comment cycle a summation of the agency's current attitudes toward critical issues in the proceeding and a description of the data on which the agency relies, indicating where the data may be inspected.

d. Providing an explanation of the tests and other procedures followed by the agency and the significance the agency has attached to them, and allowing opportunity for comment thereon.[2]

e. Holding conferences open to the public, on adequate notice, when an opportunity for all interested groups (such as agency staff, directly affected persons, agency policymakers, and public interest groups) to question one another would be effective in resolving, narrowing or clarifying the disputed issues.

f. Hearing argument and other oral presentation, when the presiding agency official or officials may ask questions, including questions submitted by interested persons.

Important circumstances tending to suggest the desirability of using such procedural devices are that (1) the scientific, technical, or other data relevant to the proposed rule are complex; (2) the problem posed is so open-ended that an agency may profit from receiving diverse public views before publishing a proposed rule for final comment; and (3) the costs that errors in the rule may impose, including health, welfare, and environmental losses imposed on the public and pecuniary expenses imposed on the affected industries and consumers of their products, are significant.

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[1] This Recommendation is addressed solely to agency process prior to the final promulgation of a rule. In addition, the agency statement of the basis and purpose of the rule incorporated in the rule when it is adopted should be clear and complete and should fully and fairly inform the public as to the basis and purpose of the rule.

[2] This may be accomplished, for example, in a public notice or by technical reports issued or relied upon by the agency and incorporated by reference in the proceeding.

2. In rulemaking proceedings subject to notice-and-comment requirements agencies should give interested persons an opportunity to indicate issues of specific fact as to which they contend that cross-examination should be considered by the agency to be appropriate. Cross-examination, where permitted, should be strictly limited as to subject and duration.

3. An agency should employ any of the devices specified in paragraph 1 or permit cross-examination only to the extent that it believes that the anticipated costs (including those related to increasing the time involved and the deployment of additional agency resources) are offset by anticipated gains in the quality of the rule and in the extent to which the rulemaking procedure will be perceived as having been fair.

RECOMMENDATION 76-4

JUDICIAL REVIEW UNDER THE CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT

(Adopted December 9–10, 1976)

The Congress has enacted provisions for judicial review in the Clean Air Act and the Federal Water Pollution Control Act (FWPCA) that are in some respects inconsistent, incomplete, ambiguous, and unsound.

Courts have sometimes felt constrained to stretch these statutes to achieve sensible results. In other instances, courts seem to have ignored sensible general Congressional direction in an attempt to do justice in particular cases. On yet other occasions courts have felt compelled by unclear provisions to reach undesirable results that Congress probably did not intend.

Experience under the two Acts has highlighted a variety of problems in the interpretation and application of the judicial review provisions, all of which are likely to be addressed by Congress in the near future.

This series of recommendations urges that, when Congress reconsiders the judicial review provisions of the principal pollution statutes, it rationalize, alter, and clarify them, guided especially by the principle that jurisdictional provisions should draw bright lines to minimize the waste and expense of litigation over whether a case has been brought in the right court. One recommendation is addressed to the Judicial Conference and calls upon the courts, pending Congressional action to clarify their powers, to utilize their discretion to transfer judicial review proceedings where transfer will avoid undue duplication of litigation.

More specifically, the Conference has in view these considerations:

1. Section 509(b) of the FWPCA provides that all standards promulgated under it by the Environmental Protection Agency, including national standards, are to be reviewed in the United States Court of Appeals for a circuit in which the petitioner resides or transacts business. Under section 307(b) of the Clean Air Act, on the other hand, certain nationally applicable standards are to be reviewed only in the Court of Appeals for the District of Columbia Circuit, but the EPA's actions in approving or promulgating State implementation plans are reviewable only "in the United States Court of Appeals for the appropriate circuit." Thus the FWPCA provides for a decentralized review of national standards, whereas the Clean Air Act requires that analogous standards be reviewed only in the D.C. Circuit. This inconsistency in approach should be resolved; the advantages of expeditious and authoritative review of all national standards in the D.C. Circuit suggests that it is the FWPCA's venue provision which should be amended. All national standards under the FWPCA should be made reviewable in the D.C. Circuit. Review of all other regulations, standards, and determinations that are reviewable in the courts of appeals under the FWPCA should be in the circuit containing the affected State or facility. These amendments would entirely supplant the present provisions for review in the circuit in which the petitioner resides or transacts business.

The Clean Air Act's specification of "appropriate circuit" as the venue for review of State implementation plan approvals has also created uncertainties, especially when several plan approvals are challenged on identical grounds. Although a perfect resolution is impossible, an amendment, clarifying that the appropriate circuit is the one containing the State whose plan is challenged, would eliminate much of the prospect of threshold litigation over the question of which is the appropriate circuit, and would also avoid the splitting of cases into two different forums whenever local and national issues are present in the same case. The possibility of undue duplication of proceedings that might result can be met by increasing the flexibility of available transfer provisions to remove doubts about the authority of any court of appeals to transfer a case to any other court of appeals.

2. Section 304 of the Clean Air Act and section 505 of the FWPCA authorize citizen suits in the district courts to require the EPA Administrator to perform "any act or duty under this Act which is not discretionary." Some district courts have accepted jurisdiction under section 304 over cases that amount to challenges to the Administrator's approval and promulgation of State implementation plans, despite the provision of section 307 for exclusive jurisdiction in the

courts of appeals to review such action. The citizen-suit provisions should not furnish an alternative or premature method of review of questions that can be raised by direct review of the EPA's actions in the courts of appeals.

The proper scope of the present citizen-suit provisions is especially unclear in the context of standard-setting, where the line between failure to act and failure to act properly is dim. The difficulty of drawing such a distinction is ample reason for giving the courts of appeals exclusive jurisdiction of actions to compel or to postpone the issuance of regulations whose validity would properly be determined in a court of appeals. It is recognized that in its review of such issues a court of appeals might conclude that the administrative record requires amplification. Since courts of appeals normally do not hold evidentiary proceedings, provision should be made for prior resort or remand to the EPA (or, if that is inappropriate, to the district court) to meet that need.

To prevent unfairness from a litigant's choice of the wrong court, Congress should provide for transfer between district courts and courts of appeals of petitions and complaints filed under the Acts. The Court of Claims transfer provision provides a good model.

3. Although both Acts provided expressly for review in the courts of appeals and for citizen suits in the district courts, it remains possible in some circumstances to obtain nonstatutory review under general Federal question jurisdictional statutes. But the citizen-suit provisions of both Acts require the plaintiff to give the EPA 60 days' notice of the intended district court action. Congress should make clear that where a nonstatutory review action is filed alleging grounds that correspond to those appropriate for the filing of an action under such citizen-suit provisions, failure to comply with the notice requirements of those provisions will require a dismissal of the case.

4. The Clean Air Act and the FWPCA provide that certain regulations reviewable by petition to the courts of appeals "shall not be subject to judicial review in civil or criminal proceedings for enforcement." Moreover, challenges to the validity of regulations must be made in the court of appeals within 30 days (air) or 90 days (water) after promulgation, unless the challenge is based "solely on grounds arising after" the statutory period. The express preclusion of review at the enforcement stage creates a highly unusual and unnecessarily harsh restriction on the right to challenge the validity of a regulation to which one is subject. Congress should amend the Acts to allow the validity of a regulation to be challenged in defense to an enforcement proceeding. It should also amend the Clean Air Act to extend the time limit for filing petitions for review in the court of appeals to 60 days and, for consistency, amend the FWPCA to reduce the 90-day period for filing a petition thereunder to 60 days. Finally, the

time limits in both Acts should be made inapplicable where the petitioner can show reasonable grounds for failure to file a timely petition.

5. Not every action of the EPA under the Clean Air Act or the FWPCA is made reviewable in the courts of appeals. Some of the omissions appear to be inconsistent with the general statutory plan, and corrective amendments are desirable.

6. Each of the four judicial review and citizen-suit provisions in the Clean Air Act and the FWPCA presents a different standard for who may petition for review or sue. This leads to undesirable confusion and inconsistency in the administration of the Acts.

Recommendation

A. Venue in the Courts of Appeals

1. Congress should provide for centralized review of national standards under the FWPCA, as is now provided under the Clean Air Act, by amending section 509(b) (33 U.S.C. § 1369(b)) to provide for the review of all such national standards in the Court of Appeals for the District of Columbia Circuit.

2. Congress should further amend section 509(b) of the FWPCA to provide that review of regulations, standards, or determinations affecting single States or facilities be had in the circuit containing the State or facility.

3. Congress should amend section 307(b) of the Clean Air Act (42 U.S.C. § 1857h–5(b)) to make explicit that the Administrator's action in approving or promulgating State implementation plans is reviewable in the circuit containing the State whose plan is challenged.

4. Courts of appeals, when reviewing cases arising under the Clean Air Act or FWPCA, should utilize existing transfer powers to avoid undue duplication of proceedings, and Congress should amend the acts or the transfer statute (28 U.S.C. § 2112(a)) to remove doubts about the authority of any court of appeals to transfer such cases to any other court of appeals to avoid undue duplication and in the interest of the administration of justice.

B. Choice between District Court and Court of Appeals for Review

1. Congress should amend the citizen-suit provisions of the Clean Air Act (section 304, 42 U.S.C. § 1857h–2) and FWPCA (section 505, 33 U.S.C. § 1365) to make clear that, insofar as suits against the Administrator of the EPA are concerned, these sections do not provide an alternative or premature method of review of questions that can be raised under the sections that provide for direct review of the EPA's actions in the courts of appeals (section 307(b), 42 U.S.C. § 1857h–5(b); section 509, 33 U.S.C. § 1369).

2. Congress should amend the Clean Air Act and FWPCA to provide that courts of appeals have exclusive jurisdiction of actions to compel or to postpone the issuance or revision of regulations whose validity is to be determined in a court of appeals. The amendments should provide that where there is need for the development of a factual record, prior resort or remand shall be made to the EPA, or, if that is inappropriate, to the district court.

3. Congress should provide, by analogy to 28 U.S.C. § 1506, for transfer between courts of appeals and district courts when a proceeding to review EPA action under the Clean Air Act or FWPCA is filed in the wrong forum.

C. Limitation of NonStatutory Review

Congress should amend the statutes to make clear that when a nonstatutory review action is filed alleging grounds that correspond to those appropriate for the filing of a citizen suit under section 304 of the Clean Air Act (42 U.S.C. § 1857h–2) or section 505 of the FWPCA (33 U.S.C. § 1365), failure to comply with the notice requirements of those sections will require a dismissal of the case.

D. Raising Defenses at the Enforcement Stage

1. Congress should amend the Clean Air Act and FWPCA to permit the validity of a regulation to be challenged in defense to an enforcement proceeding.

2. Congress should amend section 307(b) of the Clean Air Act (42 U.S.C. § 1857h–5(b)) and section 509(b) of the FWPCA (33 U.S.C. § 1369(b)) to prescribe 60 days as the period within which, under both statutes, a petition for review must be filed in the courts of appeals.

3. Congress should amend the Clean Air Act and FWPCA to ensure that petitions for review of regulations may be filed after the expiration of the time limits of sections 307(b) and 509(b), when the petitioner can show a reasonable ground for failure to file a timely petition.

E. Actions Subject to Court of Appeals Review

1. Congress should amend section 509(b) of the FWPCA (33 U.S.C. § 1369(b)) to make clear that the following actions by the EPA are reviewable in the courts of appeals:

   a. Promulgation or approval of water-quality standards under section 303 (33 U.S.C. § 1313).

   b. Promulgation of effluent guidelines under section 304 (33 U.S.C. § 1314).

   c. Promulgation of regulations governing the discharge of oil or hazardous substances under section 311(b) (33 U.S.C. § 1321(b)).

d. Promulgation of standards for marine sanitation devices under section 312 (33 U.S.C. § 1322) or determinations that a state may completely prohibit the discharge from all vessels of any sewage under section 312(f) (33 U.S.C. § 1322(f)).

2. Congress should amend the Clean Air Act to make those new car emission standards not now reviewable under section 307(b) (42 U.S.C. § 1857h–5(b)), reviewable in the courts of appeals.

F. Standing

Congress should adopt a single test of standing to govern all proceedings for judicial review under the Clean Air Act and FWPCA.

Separate Statement of G. William Frick

(1) Recommendation A.2. should be amended to provide that where "national issues" are involved they should be reviewed in the D.C. Circuit. Recommendation A.2. should be amended in the same fashion.

Cases involving permits and permit programs under the FWPCA sometimes involve generic issues that apply to EPA's actions nationwide. For essentially the reasons discussed in our comments on recommendation A.3., below, we believe such issues should be reviewed in the D.C. Circuit. This result could be specified, without disturbing the general thrust of the Recommendation, by amending section 509 of the FWPCA as suggested in our comments of November 12, 1976.

Although approval and promulgation of State implementation plans (SIP's) under the Clean Air Act usually involve issues peculiar to the affected States, such actions sometimes involve generic determinations of nationwide scope or effect. Examples include EPA's granting of two-year extensions of the date for attainment of national ambient air quality standards in a number of metropolitan areas[1] and its promulgation of generic regulations (applicable to all States) that require prevention of significant deterioration of air quality (40 CFR 52.21). We view such actions as virtually identical to promulgation of "national standards",[2] as to which recommendation A.1. expresses a prference for review in the D.C. Circuit.

Under the existing law, it is possible to argue that the D.C. Circuit is the "appropriate circuit" for review of "national" SIP issues, and three courts of appeals have so held.[3] Recommendation A.3., however, would provide that such issues, together with all other SIP issues, must be in the local circuit. Although recommendation A.4. would promote transfer to avoid "undue duplication of proceedings", it would provide no basis for arguing that the D.C. Circuit is the appropriate transferee forum.

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[1] *See* NRDC v. EPA, 475 F. 2d 968 (D.C. Cir. 1973).

[2] As with national standards, such actions typically involve establishment or application of uniform principles for all States, are taken on a single administrative record, and do not involve factual questions unique to particular geographical areas.

[3] Dayton Power & Light Co. v. EPA, 520 F. 2d 703, 706–07 (6th Cir. 1975) (regulations for prevention of significant deterioration); NRDC v. EPA, 475 F. 2d 968, 969–70 (D.C. Cir. 1973) (two-year extensions and similar issues); NRDC v. EPA, 465 F. 2d 492, 494 (1st Cir. 1972) (same).

As indicated by Professor Currie in his report, Congress intended review in the D.C. Circuit of "matters on which national uniformity is desirable." Among the reasons for this are the D.C. Circuit's obvious expertise in administrative law matters and its sensitivity to Congressional mandates. In addition, the D.C. Circuit has become thoroughly familiar with the Clean Air Act—a very complex statute—and with its equally complex legislative history. We believe it makes sense to centralize review of "national" SIP issues in the D.C. Circuit, taking advantage of its administrative law expertise and facilitating an orderly development of the basic law under the Act, rather than to have such issues decided separately by a number of courts, some of which would probably lack frequent exposure to the Act and its legislative history. Moreover, the validity of a nationally applicable regulation will not turn on the particulars of its impacts within a given Circuit.

(2) Recommendation D.1., which would allow the challenge of validity of regulations in enforcement proceedings, should be deleted.

The "legislative history" of this recommendation suggests that it is inspired in part by a concern that the time limits for filing of petitions for review of the validity of regulations are too short, and in part by a concern that *any* time limit may unreasonably constrain the opportunity for such review.

As to the first factor we would much prefer the solution offered by Recommendation D.2. As to the second, we oppose the recommendation on several grounds. Permitting challenges to validity in enforcement would leave open the question of validity indefinitely, notwithstanding Congress' intent to have it decided expeditiously;[4] would require EPA to retain its often immense records indefinitely; would mean district court rather than court of appeals review of validity, notwithstanding the clear intent of Congress; and might very well lead to conflicting results, with resolution of conflicts (if at all) only after review by the courts of appeals and the Supreme Court. In our view, facial validity need be determined only once and should be determined expeditiously; there are other mechanisms for relief based on factors peculiar to individual sources (see comments on recommendation D.3.), and it makes no sense to require every district court presented with the issue of validity to engage in duplicative review of the often immense records involved.

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[4] *See* Kennecott Copper Corp. v. EPA, 462 F. 2d 846, 849 & nn. 14–15 (D.C. Cir. 1972). Expeditious resolution of SIP issues is particularly important because Congress mandated attainment of the health-protective ambient air quality standards (via SIP's) by a time certain, regardless of economic or technical feasibility.

The Recommendation glosses over that fact that State implementation plans, which have and will continue to make up the vast majority of onerous air pollution requirements, can be challenged facially and on grounds of infeasibility through administrative and judicial review channels in the States.[5]

Finally, as Professor Walter Gellhorn observed at the Plenary Session, there is an inherent contradiction between Recommendations D.1. and D.3., viz, the argument is for extending the deadlines for obtaining review while at the same time espousing that there should be no deadline for obtaining review. That the federal courts involved are at different levels does not cure this contradiction.

(3) Recommendation D.3., which would allow late filings of petitions for review upon reasonable grounds shown, should be deleted.

The "legislative history" of this recommendation suggests a number of concerns that may have prompted it: (a) the problem of short time limits; (b) the problem of persons who fail to file through carelessness; (c) lack of opportunity for consideration of individual factors that might affect validity; and (d) the problem of persons who are unaffected by a regulation until after the deadline for filing has passed. My comments are as follows:

(a) Short time limits. We prefer Recommendation D.2. as providing a more direct solution to this problem, if it is thought to be a problem. Protection of one's rights need not await detailed analysis of what EPA has actually done; common practice is to file one-paragraph petitions alleging that EPA's action was arbitrary or capricious, or similarly general grounds.

(b) Carelessness. The industries we regulate generally submit extensive comments on proposed regulations, sometimes "lobby" the agency extensively, often mount well-coordinated attacks on final regulations in court, and seem to follow the development of regulations rather well. And, even before publication of proposals in the Federal Register, they receive notice through EPA's gathering of supporting data from them, through trade associations, through industry representatives on EPA advisory committees, or during pre-publication review by other federal agencies. We believe the public interest in early resolution of validity (clearly intended by Congress) should outweigh the interests of those who fail to file timely petitions through carelessness.

(c) Individual factors that might affect validity. As Professor Currie seems to acknowledge in his report, individual factors are often if not always irrelevant to the validity of EPA regulations. Those cited as examples do not appear to be grounds for challenge of SIP approvals,[6] for example, or of national standards adopted under section 111 or 112 of the Clean Air Act (42 U.S.C. 1857c–6,

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[5] *See* Union Electric Co. v. EPA, 96 S. Ct. 2518 (1976).

[6] *See* Union Electric Co. v. EPA, *supra*.

1857c–7). Relief based on such factors may be available through a variety of mechanisms,[7] but they do not go to the validity of the regulations.

(d) Previously unaffected parties. In our view, persons who choose to do business in a regulated industry (or to expand into a geographical area subject to controls) after the establishment of applicable regulations take the business (or the area) as they find it. If a company invents a new process that presents particular problems under an applicable regulation, it may petition for revision of the regulation.

Finally, we note that this recommendation would leave the question of validity open indefinitely, with all the problems that would entail (see discussion of Recommendation D.1.).

RECOMMENDATION 76–5

INTERPRETIVE RULES OF GENERAL APPLICABILITY AND STATEMENTS OF GENERAL POLICY

(Adopted December 9–10, 1976)

Agencies often explain their view of the meaning of statutes or rules by issuing interpretive rules of general applicability, and agencies indicate how they will exercise discretion by announcing statements of general policy. The Administrative Procedure Act requires that these interpretive rules and policy statements be published in the Federal Register. But the Act does not require that interested persons be given advance notice and opportunity to comment upon interpretive rules and policy declarations. Courts, however, have occasionally imposed that requirement.

At times policy statements and interpretive rules are barely distinguishable from substantive rules for which notice and comment is required. For that and other reasons many agencies have often utilized the notice-and-comment procedures set forth in section 553 of the Act, without regard to whether their pronouncements fall into one category or another. This is, in general, beneficial to both the agencies and potentially affected elements of the public. Providing opportunity for comment upon interpretive rules and policy statements of general applicability, sometimes before and sometimes after their adoption, makes for greater confidence in and broader acceptance of the ultimate agency judgments. The following recommendations look toward wider voluntary adoption of such procedures by the agencies.

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[7] Under the Clean Air Act, for example, relief may be available by way of SIP revisions (including variances) approved or promulgated by EPA, postponements of SIP requirements under 42 U.S.C. 1857c–5(f). enforcement orders fixing a "reasonable time" for compliance (42 U.S.C. 1857–c–8(a)(4), equitable relief provided by court order in enforcement proceedings (*see* 42 U.S.C. 1857c–8(b)). waivers or exemptions under 42 U.S.C. 1857c–7, or petition for revision of any applicable regulation.

Nothing here proposed would in any event alter the existing provisions of Administrative Procedure Act section 553 (e), allowing any person to petition at any time for the amendment or repeal of a rule, including an interpretive rule or a statement of general policy. Moreover, the recommended procedures are not intended to apply to interpretations or policies set forth in opinions in formal or informal adjudications.

RECOMMENDATION

1. Before an agency issues, amends, or repeals an interpretive rule of general applicability or a statement of general policy which is likely to have substantial impact on the public, the agency normally should utilize the procedures set forth in Administrative Procedure Act subsections 553 (b) and (c), by publishing the proposed interpretive rule or policy statement in the Federal Register, with a concise statement of its basis and purpose and an invitation to interested persons to submit written comments, with or without opportunity for oral presentation. If it is impracticable, unnecessary, or contrary to the public interest to use such procedures the agency should so state in the interpretive rule or policy statement, with a brief statement of the reasons therefor.
2. Where there has been no pre-promulgation notice and opportunity for comment, the publication of an interpretive rule of general applicability or a statement of general policy, even one made effective immediately, should include a statement of its basis and purpose and an invitation to interested persons to submit written comments, with or without opportunity for oral presentation, within a following period of not less than 30 days. The agency should evaluate the rule or statement in the light of comments received. Not later than 60 days after the close of the comment period, the agency should indicate in the Federal Register its adherence to or alteration of its previous action, responding as may be appropriate to significant comments received. An agency may omit these post-adoption comment procedures when it incorporates in the interpretive rule or policy statement a declaration, with a brief statement of reasons, that such procedures would serve no public interest or would be so burdensome as to outweigh any foreseeable gain.

RECOMMENDATION 77–1

LEGISLATIVE VETO OF ADMINISTRATIVE REGULATIONS

(Adopted September 15–16, 1977)

Congress has by statute occasionally required that certain agency actions be subject to Congressional approval or disapproval before they became effective. Several proposals have now been advanced which would apply this procedure to all substantive rules issued pursuant to the notice-and-comment procedures of 5 U.S.C. §553 (which are not subject to 5 U.S.C. §§556 and 557). These proposals typically would provide that if either house of Congress disapproved a proposed rule within a specified period, such as 60 days, it would not take effect.

The Conference believes that this kind of legislative veto would not further the ability of Congress to direct agency policy; moreover, it would bring about undesirable changes in the rulemaking process and in relationships among the agencies, Congress, and the courts.

1. Agencies. Legislative veto proposals contemplate postponing the effective date of most agency rules for two months beyond the present statutory period of thirty days that must elapse between their publication in the Federal Register and their taking effect. This additional period is prescribed so that Congress may have opportunity to exercise the power of review. The volume of existing agency rulemaking and the technical or noncontroversial nature of many rules suggest, however, that few proposed rules would in fact receive specific Congressional attention. Nevertheless the operation of the great mass of rules, whether or not actually considered by Congress, would be postponed without corresponding benefit and often with unfortunate public consequences. In instances when Congress did undertake review, it would risk engaging in piecemeal examination of particular rules, in isolation from an agency's program as a whole, and without benefit of the experience and specialized knowledge that had shaped the elements of that program. Of great concern is the possibility that Congressional review of administrative agencies' rules would significantly diminish the importance of the procedures now prescribed by law to assure public participation in rulemaking. Rules that survive active legislative review are likely to be based upon negotiations with Congressional units rather than upon the information, expression of opinion, research materials, and background experience that shaped the agency's policy.

2. Congress. Legislative review of substantive rules would increase the workload of Congress substantially. Review of complex, technical rules would be difficult, time consuming, and often impracticable. Yet, in the belief that each agency's work product would have to undergo later scrutiny by Congress or its committee staffs, Congress might be more ready even than at present to delegate power in broad terms and to avoid specificity and precision in formulating legislative policies that guide agency discretion. Piecemeal review, moreover, might create a misleading impression that Congress has endorsed by implication whatever it has not explicitly disapproved. Were that impression to become widespread, Congress might be deemed to have accepted a responsibility of unforeseen dimensions.

3. Courts. A procedure for Congressional review of agency rules may also imply legislative ratification of rules not disapproved by Congress. If legislative approval is inferred from inaction by Congress under the proposed procedure, then the scope of judicial review may be reduced without provision of an adequate substitute. Existing constraints on agency rulemaking discretion would therefore be lessened in a manner not intended by Congress.

The objectives of a generic requirement of legislative review of administrative rules can be realized by careful delineations of basic Congressional policy, by particularized statutes addressed to specific issues, and by Congressional hearings focused on review of agency policy rather than on details. Careful attention to appointments and appropriations constitutes a further effective means of maintaining Congressional oversight of agencies' use of delegated power.

RECOMMENDATION

The Conference urges that Congress should not, in general legislation or as a routine practice, provide for prior submission of agency rules for Congressional review and possible veto.

RECOMMENDATION 77–2

JUDICIAL REVIEW OF CUSTOMS SERVICE ACTIONS

(Adopted September 15–16, 1977)

A. Jurisdiction and Powers of the Customs Court

The Customs Court has exclusive jurisdiction to review decisions of the Customs Service (1) denying protests of importers relating to certain enumerated matters and (2) rejecting petitions of United States manufacturers, producers or wholesalers to challenge certain actions taken with respect to merchandise imported by others. Actions of the Customs Service suspending or revoking customs brokers' licenses are reviewable, by statute, in the courts of appeals.[1] There are other actions of the Customs Service that are administratively final but for which no specific statutory provision for review has been made. These include decisions made by the Service to suspend or discontinue permits for immediate delivery of merchandise as well as decisions to exclude certain types of merchandise from entry. Such actions are now reviewable, if at all, in the district courts pursuant to their general or special jurisdiction.

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[1] The Conference has not studied the advisability of a change in the reviewing forum for such action. Nor does the Conference intend that the current method of reviewing personnel actions of the Customs Service or its determinations under the Freedom of Information Act or like statutes be disturbed.

Moreover, the Customs Court does not have power at present to "compel agency action unlawfully withheld or unreasonably delayed," as can district courts under the APA, 5 U.S.C. §706(1). The Customs Service sometimes fails to act on significant matters for such extended periods that its inaction may amount to agency action, as defined by 5 U.S.C. §551(13) to include "failure to act." An example is the failure or refusal of the Service to complete the final assessment of duties payable on an importation. Finally, the Customs Court has no power at present to provide relief until after the protest or petition process has run its course even though the Customs Service has taken action with such immediate and drastic impact on a person that a district court considering comparable action of another agency would treat it as final for purposes of review. The recommendation would provide for review by the Customs Court of the final actions and failures to act just described.

Decisions to exclude merchandise may be made either by the Customs Service or another agency, such as the Food and Drug Administration. All exclusion decisions pursuant to a customs law (*i.e.*, a law applicable only to imported merchandise, usually codified in Title 19 of the United States Code), whether made by the Customs Service or some other agency, are now reviewable in the Customs Court. This review would be unaffected by the recommendation. Exclusion decisions under a law that is not a customs law are never reviewed in the Customs Court. When such an exclusion decision is made by an agency other than the Customs Service, the Customs Court does not, and under the recommendation would not, review the decision. However, when such an exclusion decision is made by the Customs Service, the recommendation would give the Customs Court exclusive jurisdiction to review it.

The Customs Court has sometimes been said not to have "equity powers." What is meant by this is not clear, but the recommendation would give the Customs Court all powers, injunctive and other, of the district courts.

The Customs Court is unique among Article III courts in being subject to a requirement that not more than five of its nine judges be appointed from the same political party and in having a chief judge selected from time to time by the President. These requirements, appropriate perhaps for multi-member administrative agencies, are not consonant with the Article III judicial role of the Customs Court, especially as that role would be expanded by these recommendations.

1. JURISDICTION WITHOUT A PROTEST OR PETITION

Congress should amend 28 U.S.C. §1582 to broaden the jurisdiction of the Customs Court by giving the court exclusive jurisdiction of any civil action brought to challenge final agency action (as defined in the Administrative Procedure Act) of the Customs Service except (1) action specifically subject to review in another court and (2) action pertaining to the exclusion of merchandise, under a law that is not a customs law, and taken by the Customs Service on the request or at the direction of a court or another federal agency.

2. REMEDIAL POWERS

Congress should amend 28 U.S.C. §1581 to confer upon the Customs Court in respect of actions properly pending before it the remedial powers of a United States district court.

3. POLITICAL AFFILIATION OF COURT APPOINTEES AND SELECTION OF CHIEF JUDGE

Congress should amend 28 U.S.C. §251 to delete the requirement that not more than five of the nine judges of the Customs Court be appointed from the same political party and to provide that the chief judge is appointed by the President with the advice and consent of the Senate, as in the case of the Court of Claims and the Court of Customs and Patent Appeals.

B. Standing to Seek Administrative and Judicial Review

Under Section 516 of the Tariff Act of 1930, 19 U.S.C. §1516, an "American manufacturer, producer, or wholesaler" may ask for and receive information on the duty imposed on imported merchandise of a kind manufactured, produced or dealt in by him and, thereafter, contest the appraised value of, classification of, or the rate of duty assessed upon, that merchandise by petition to the Customs Service. As stated under heading A, a decision concerning such a petition may be reviewed in the Customs Court. The recommendation is that Congress consider broadening the category of persons entitled to seek this sort of administrative relief and, thereafter, review in the Customs Court to include all persons adversely affected by an incorrect determination by the Customs Service. The Conference believes that the category of persons eligible to challenge such determinations by the Customs Service should thus conform with modern administrative practice, unless Congress determines that overriding considerations of economic policy make this undesirable.

Only the importer of excluded merchandise may now protest within the Customs Service the exclusion of merchandise and have denial of that protest reviewed by the Customs Court. The recommendation contemplates a broadening of the standing provision to enable any adversely affected person to seek administrative and judicial review of action either to exclude or to admit merchandise (unless the action is taken under a law that is not a customs law upon the request or at the direction of a court or another agency).

Under A(1) final actions of the Customs Service other than the denial of protests or petitions relating to classification, appraisal, duty and admission of merchandise, such as the suspension of immediate delivery permits, would be subject to review in the Customs Court. The recommendation contemplates conferring upon any adversely affected person who has exhausted his administrative remedies standing to seek review of such actions. The recommendation does not specify what procedures must be exhausted.

1. DECISIONS CONCERNING DUTIES

Congress should consider amending Section 516 of the Tariff Act of 1930, 19 U.S.C. §1516, to allow any person adversely affected by an incorrect determination of the appraised value of, classification of, or rate of duty assessed upon, imported merchandise to obtain from the Customs Service information concerning such appraisal, classification or rate and to petition for a change. Denials of such petitions should be reviewable in the Customs Court.

2. EXCLUSION CASES

Congress should consider enacting a new provision giving any person adversely affected by an action of the Customs Service, concerning merchandise that is, or should be, excluded from entry or delivery, a means of seeking administrative review of such action, with subsequent review in the Customs Court. Such a procedure should not be available to challenge action pertaining to the exclusion of merchandise, under a law that is not a customs law, and taken by the Customs Service on the request or at the direction of a court or another federal agency.

3. OTHER ACTIONS

If Congress broadens the jurisdiction of the Customs Court as recommended in A(1), it should also consider providing that actions within the broadened jurisdiction may be brought by any adversely affected person who has exhausted his administrative remedies.

C. Burden of Proof in the Customs Court

The Customs Court operates under a statute that establishes a presumption that a Customs Service decision under review is correct and places upon a party seeking review the burden of proving the decision incorrect. Trial in the Customs Court is had on a record made in the court although 28 U.S.C. §2632(f) provides that, upon the service of a summons, the Customs Service is to transmit certain documents underlying the Customs Service decision to the court "as part of the official record of the civil action." The Customs Court and the Court of Customs and Patent Appeals have inferred from the statute a further requirement, that in order to prevail the party seeking review must prove, in addition to the incorrectness of the agency's decision, what the correct decision should be. The recommendation would do away with that unorthodox further requirement and make Customs Court review of Customs Service actions conform in this respect with the review of actions of other agencies by other courts. The mode of review would continue to be a de novo trial (in the sense indicated above), which is considered appropriate because of the high degree of informality of most Customs Service procedures.

1. ELIMINATION OF THE PLAINTIFF'S DOUBLE BURDEN

Congress should amend 28 U.S.C. §2635(a) to revise the Customs Court's standard of review in the following way: The presumption of correctness of Customs Service decisions and the imposition upon a party challenging a decision the burden of proving otherwise would be retained, but an additional requirement read into the statute by the Customs Court and the Court of Customs and Patent Appeals would be eliminated. The additional requirement is that the challenging party prove not only that the Customs Service was wrong but also what a correct decision would be or risk suffering affirmance of the incorrect adverse decision.

Specifically, the amended statute should provide that, if the Customs Court determines that action taken by the Customs Service is erroneous, the court should modify or set aside such action; if the court is able to determine what action is correct, it should so determine and order that the correct action be taken; if the court, after exhausting its processes and procedures, cannot determine what action is correct, it should remand the case to the Customs Service with instructions to take action consistent with the decision of the court; any redetermination made by the Customs Service pursuant to a remand should be subject to a new protest or petition; a decision by the Customs Court to remand a case should be appealable.

D. Review of Decisions to Exclude Merchandise

Exclusion of merchandise is a severe remedy. The recommendation would attempt to ensure expedited review of exclusion decisions and would delete the extraordinary authority of the Customs Service to detain and seize imported merchandise that allegedly infringes a United States trademark or copyright in the absence of the same sort of court order that is required before action may be taken against allegedly infringing domestic merchandise.

1. EXPEDITED REVIEW

Congress should amend the statutes giving preference to certain types of cases in the Customs Court, 28 U.S.C. §2633, and the Court of Customs and Patent Appeals, 28 U.S.C. §2602, to ensure a similar preference for cases properly before either court involving the exclusion of merchandise from entry or delivery.

2. THE CUSTOMS SERVICE'S AUTHORITY UNDER THE TRADEMARK AND COPYRIGHT STATUTES

Congress should amend the statutes under which the Customs Service is authorized to detain and seize merchandise that allegedly infringes a United States trademark, 19 U.S.C. §1526, or copyright, 17 U.S.C. §603, to provide that the Customs Service may take no such action until after the owner of the trademark or copyright has obtained an order in a United States district court enjoining the importation. Alternatively, Congress should amend the trademark statute, as it has the copyright statute, to authorize the Customs Service to establish by regulation such a condition precedent to its acting to detain and seize allegedly infringing merchandise, and the Customs Service should promulgate such a regulation. In either event, the Customs Service should then adopt express procedures that would enable the owner of a trademark or copyright to identify imported merchandise that may infringe his mark or copyright.

E. Imposition of Civil Penalties

The penalty for violations of Section 592 of the Tariff Act of 1930, 19 U.S.C. §1592, and some other import statutes is forfeiture of imported merchandise or its value. These penalty provisions are unsatisfactory. The statutory forfeiture penalty is likely to be disproportionate to the gravity of the alleged offense. Although the Customs Service is usually prepared to mitigate the penalty, the statutes pose the following dilemma: If the alleged violator does not wish to accept the proffered mitigation because he believes he did not violate the statute or because he believes that he is entitled to a greater degree of mitigation, he is subject to suit in the district court for the full forfeiture value. Moreover, he will lose the benefit of any mitigation if the government can prove a violation, however insignificant, on his part. The recommendation would rationalize penalty procedures.

1. THE RATIONALIZATION OF SECTION 592

Section 592 of the Tariff Act of 1930, 19 U.S.C. §1592, prohibiting fraudulent or false statements or practices respecting imports, should be revised to make it fairer and more rational in its operation.

(a) Section 592 should be amended to provide for civil money penalties against the person violating the statute rather than for forfeiture of the merchandise or the full value thereof. Congress should establish maximum penalties based upon the revenue deficiency, if any, resulting from the violation and upon the degree of culpability of the violator. In any case in which the violation does not result in a revenue deficiency, the maximum penalties should be based upon a percentage of the value of the imported merchandise and upon the degree of culpability of the violator. If the violator is an importer, he should be given the option of surrendering his merchandise in lieu of payment of any penalty assessed.

(b) The Customs Service should continue to have the authority to mitigate civil penalties. If an assessment is contested, an action by the government to enforce the penalty should be in the Customs Court. In such an action, the government should have the burden of proving the act or omission constituting a violation and, if so alleged, the intentional nature thereof. The Customs Court should be authorized to determine de novo the amount of the penalty.

(c) In order to ensure that those subject to possible penalties under Section 592 know what is expected of them under the laws administered and enforced by the Customs Service, the Service should, to the maximum extent feasible, adopt and publish standards that will guide its determinations under such laws.

(d) The authority of the Customs Service to seize and hold merchandise under Section 592, other than prohibited or restricted merchandise, should be limited to instances where such seizure and holding are necessary to protect its ability to collect any revenue deficiency or penalty, and the Customs Service should be required to release the merchandise to the owner upon his provision of security for payment of such revenue deficiency or penalty. Where no such release is effected by the owner, the Customs Service should be required to release the merchandise not later than 60 days after seizure unless the government has initiated an action in the Customs Court within that period and obtained an extension for good cause from the court. In instances where the Customs Court permits the Service to hold merchandise for sale by the Service to satisfy any revenue deficiency or penalty determined by the judgment of the court, the net proceeds of such sale, after allowance for the judgment and costs of the sale, should be paid to the owner.

2. OTHER STATUTES

Each of the other penalty provisions enforced by the Customs Service should be reviewed and, if appropriate, revised in a manner consistent with the foregoing recommendations for the revision of Section 592.

RECOMMENDATION 77-3

EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING PROCEEDINGS

(Adopted September 15-16, 1977)

In Recommendation 72-5 the Conference expressed the view that, generally, agency rulemaking is preferably carried out through the simple, flexible and efficient procedures of 5 U.S.C. §553. That statute requires publication of notice of proposed rulemaking and provision of opportunity for submission of written comments; additional procedures may be utilized by the agencies as they deem necessary or appropriate. Recommendation 72-5 counseled that Congress ordinarily should not impose mandatory procedural requirements going beyond those of §553 in the absence of special reasons for doing so. In Recommendation 76-3 the Conference amplified its 1972 recommendation by suggesting ways in which agencies might usefully supplement the minimum procedures required by §553 in appropriate circumstances.

The primary purposes of rulemaking procedures under §553 are to enhance the agency's knowledge of the subject matter of the proposed rule and to afford all interested persons an adequate opportunity to provide data, views, and arguments with respect to the agency's proposals and any alternative proposals of other interested persons. Section 553 procedures, in some instances, also serve to provide the basis for judicial review. To the extent consistent with all of these purposes, the agencies should have broad discretion to fashion procedures appropriate to the nature and importance of the issues in the proceeding, in order to make rules without undue delay or expense. Informal rulemaking should not be subject to the constraints of the adversary process. Ease of access to information and opinions, whether by recourse to published material, by field research and empirical studies, by consultation with informed persons, or by other means, should not be impaired.

While the foregoing considerations militate against a general prohibition upon ex parte communications in rulemaking subject only to Section 553, certain restraints upon such communications may be desirable. Ex parte communications during the rulemaking process can give rise to three principal types of concerns. First, decision makers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for open government; second, significant information may be unavailable to reviewing courts; and third, interested persons may be unable to reply effectively to information, proposals or arguments presented in an ex parte communication. In the context of Section 553 rulemaking, the first two problems can be alleviated by placing written communications addressed to a rule proposal in a public file, and by disclosure of significant oral communications by means of summaries or other appropriate techniques. The very nature of such rulemaking, however, precludes any simple solution to the third difficulty. The opportunity of interested persons to reply could be fully secured only by converting rulemaking proceedings into a species of adjudication in which such persons were identified as parties, and entitled to be, at least constructively, present when all information and arguments are assembled in a record. In general rulemaking, where there may be thousands of interested persons and where the issues tend to be broad questions of policy with respect to which illumination may come from a vast variety of sources not specifically identifiable, the constraints appropriate for adjudication are neither practicable nor desirable.

RECOMMENDATION

In rulemaking proceedings subject only to the procedural requirements of §553 of the APA:

1. A general prohibition applicable to all agencies against the receipt of private oral or written communications is undesirable, because it would deprive agencies of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

2. All written communications addressed to the merits, received after notice of proposed rulemaking and in its course, from outside the agency by an agency or its personnel participating in the decision should be placed promptly in a file available for public inspection.

3. Agencies should experiment in appropriate situations with procedures designed to disclose oral communications from outside the agency of significant information or argument respecting the merits of proposed rules, made to agency personnel participating in the decision on the proposed rule, by means of summaries promptly placed in the public file, meetings which the public may attend, or other techniques appropriate to their circumstances. To the extent that summaries are utilized they ordinarily should identify the source of the communications, but need not do so when the information or argument is cumulative. Except to the extent the agencies expressly provide, the provisions of this paragraph and the preceding paragraph should not be construed to create new rights to oral proceedings or to extensions of the periods for comment on proposed rules.

4. An agency may properly withhold from the public file, and exempt from requirements for making summaries, information exempt from disclosure under the Freedom of Information Act, 5 U.S.C. §552.

5. Agencies or the Congress or the courts might conclude of course that restrictions on ex parte communications in particular proceedings or in limited rulemaking categories are necessitated by considerations of fairness or the needs of judicial review arising from special circumstances.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON STRENGTHENING REGULATORY AGENCY MANAGEMENT THROUGH SEMINARS FOR AGENCY OFFICIALS

(Adopted June 5–6, 1975)

In pursuance of its continuing concern with the effective management of collegial regulatory agencies,[1] the Conference approves the following statement.

(1) In multimember regulatory agencies, the division of collegial responsibilities makes agency management unusually complex. The working relationships in a collegial setting involving chairmen, members, and top staff are unique in a number of respects. They are foreign to the dominant experience of many who find themselves involved in them. Previously learned ways of doing things must be undone and new knowledge forged from experience.

(2) The objectives of prior efforts to strengthen the managerial role of the chairmen of collegial agencies have largely been realized. Although the preeminence of chairmen in the management realm is generally established, there remains some ambiguity in their role in relation to the role of members. This condition frequently results in some underlying tension in chairman-member relationships. But differences are seldom openly articulated and worked through. When differences arise, they are likely to appear in the context of particular issues, and not in a way that provokes attention to general questions about working relationships.

(3) Chairmen, though thrust into a more active managerial role than other agency members, sometimes seem unenthusiastic about management-related matters and have had limited preparation for this aspect of their responsibilities. Other agency members, who in a broad sense are ultimately charged with responsibility for management, likewise often appear to lack interest in management matters, such as setting regulatory priorities and resource allocations. As a result, there is little focused attention given at the top of the agencies to the larger management questions and particularly to the nature and viability of the processes through which major management-determinations are made.

(4) Although differences among agencies must be recognized fully in treating problems of regulatory management, there are certain

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[1] See Views of the Administrative Conference on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization, adopted May 7, 1971.

commonalities. Even if experiences are not always directly transferable, there will be positive effects that result from their exchange. Yet there has been very little systematic communication among the agencies, especially at the level of chairmen and commissioners.

(5) Well-planned and adeptly conducted seminars are uniquely suited to developing perspectives and understandings related to the roles of chairmen and members, stimulating interest in particular problem areas, suggesting approaches to problem-solving, and exchanging information about organizational performance. The value of such endeavors has been demonstrated through a number of programs aimed at groups of officials not unlike regulatory officials. New Members of Congress participate in such enterprises. And the seminars regularly conducted for members of the Federal judiciary by the Federal Judicial Center are especially relevant. Regulatory agency performance thus should be improved by affording agency members the opportunity to participate in seminars at which they can exchange views with officials of other agencies on management problems, alternative and innovative approaches to policy formulation, intraagency and interagency and governmental relationships, and methods of dealing with the complex role questions presented when regulatory problems are administered in a collegial setting.

(6) In exercise of its statutory authority to "arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure," the Administrative Conference should arrange for the conduct of periodic seminars for regulatory agency officials. Participants should be drawn principally from among the chairmen, members, and senior staff of the independent regulatory agencies, and the agencies should cooperate in arranging their participation. In the seminars, special emphasis should be placed on the interests and needs of officials who are newly appointed to their positions. The seminars should deal with matters basic to agency performance, such as budget and personnel policies and procedures; priority setting; relationships with Congress, departments and agencies, and the Executive Office of the President; and the implications of the Administrative Procedure Act for the management of regulatory programs.

(7) The seminars should be scheduled at the discretion of the Chairman of the Administrative Conference. The participating agencies should play a role in planning the seminars, as should the U.S. Civil Service Commission. The seminar format should be flexible and should emphasize informal problem-oriented group discussion, with expert informational inputs as necessary, rather than formal presentations. Reliance should be placed on the participants themselves and on others experienced in the regulatory process, including former members and chairmen. Each seminar should be evaluated by the participants as an aid to improving subsequent efforts.

STATEMENT ON PROCEDURES TO DEAL WITH EMERGENCY SHORTAGES OF NATURAL GAS

(Adopted December 9–10, 1976)

Consideration of procedures to deal with possible emergency shortages of natural gas involves the analysis and weighing of numerous and complex issues. The Congress is the proper body to consider the policy responses which may be appropriate for dealing with such an emergency. Of significance to the Administrative Conference is that, in any such deliberative process, Congress should consider from the beginning how to assure fair and effective administrative procedure in any program which it adopts. This Statement is not intended to recommend any particular program or to go beyond procedural considerations.

If the Congress believes an emergency shortage of natural gas is a significant possibility in the foreseeable future, then the necessary investigation and analysis of the issues noted in this Statement should be undertaken soon. By giving early consideration to the difficult issues which must be resolved, the Congress can enable the orderly development of fair and effective administrative procedures to be available in the case of need. The alternative to such prompt consideration is likely to be, in the event of an emergency, a hastily-established program which might not adequately provide for public participation in the development of policies and regulations nor for suitable procedures for the determination of matters involving identifiable parties. This might work unnecessary hardships, invite public distrust, and create more serious social and economic dislocations than necessary.

1. At the present time the procedures by which Government can deal with an emergency created by an undersupply of natural gas have severe limitations. Governmental authority over natural gas, to the extent it exists, is fragmented among the Federal Power Commission and the several States:

(a) The Natural Gas Act confines the Federal Power Commission's jurisdiction, and consequently its curtailment authority, mainly to the interstate sale and transportation of natural gas; the Commission does not exercise authority over natural gas that is produced and consumed within a single State, nor normally over the retail sale distribution of either intrastate or interstate gas.

(b) The procedures of the Federal Power Commission are largely designed for certification and ratemaking cases, and they are generally ill-suited for emergency situations. While the Commission has adopted an end-use curtailment policy, in fact it is without jurisdiction to enforce it at the State level. Nor does the Commission have the authority to order interconnections among pipelines and transfer of gas from one to another.

(c) The respective States have widely varying resources and interests. No procedures exist for them to distribute the burden of an emergency shortage of natural gas among themselves and throughout the Nation.

2. The range of possible legislative responses is wide, and the questions involved are of the highest complexity:

(a) The approaches which have been suggested include: Complete reliance on the free market mechanism to bring supply and demand into balance; primary reliance on the free market mechanism, coupled with standby emergency procdures of some sort; an end-use allocation procedure administered jointly by a Federal agency and the States; a procedure in which States or regions or classes of users receive pro-rata portions of the gas used in a base period; incentives to conserve natural gas and other forms of energy; accelerated development of renewable forms of energy; extension of federal regulations to the intrastate gas market.

(b) Determination of the appropriate approach, from among the foregoing or others, is for Congress to resolve through the political process.

3. Any congressional action to institute Federal or Federal/State allocation procedures requires consideration of many complex subjects, several of which are noted below in Paragraphs 4–6. If, therefore, Congress determines (*a*) that an emergency shortage of natural gas is a significant possibility in the foreseeable future and (*b*) that its response will be some sort of allocation procedures, it should act promptly in view of the time involved in the legislative process and the lead time necessary to establish any new program. Adequate lead time should also be provided to allow States, gas users, and industry participants to plan on a sound, well-conceived basis.

4. If Congress were to consider some sort of end-use allocation procedure, the following issues should be addressed in the legislative process:

(a) Comprehensive data are required for its organization and implementation, and such data do not appear to be readily available in sufficiently accurate, complete, and compatible form.

(b) An end-use allocation procedure might adversely affect incentives for the conservation of natural gas by States, gas distributors, and users, and for the development of new sources of supply, so that care should be taken to minimize any such adverse effects.

(c) The sheer number of users of natural gas, each of which or each category of which might require consideration in an end-use allocation procedure, and each of which would incur particular economic and social consequences if the supply of natural gas were interrupted, means that it may be impractical to administer an end-use allocation procedure exclusively by means of a centralized Federal agency.

5. If Congress were to consider involving the States in the administration of an end-use allocation procedure, the following issues should be addressed in the legislative process:

(a) In some States, the authority to formulate and implement relevant energy policy resides in a public utilities commission, while in other States it resides in the Governor's office, and in still other States legislative provision for such authority does not currently exist. In some States, authority is divided between statewide and local governmental entities.

(b) Many State governments appear at present to lack the resources and expertise to administer an end-use allocation system. A comprehensive survey of the respective personnel and financial resources of the various States that would be needed to undertake an end-use allocation system apparently does not currently exist.

(c) Congress should consider whether and by what means the Federal Government may induce a State to take legislative action.

(d) Some States have taken measures to protect their respective economies from the adverse effects of natural gas shortages, and they would probably resist any Federal system which failed to recognize and reward such diligence.

6. If Congress were to consider authorizing some Federal agency to order, as part of an allocation procedure, interconnections among interstate and intrastate pipelines and the mandatory transfer of gas from one to another, then the legislative process should address the fact that no comprehensive, accurate, compatible, and readily available data concerning the existence and feasibility of interconnections among pipelines exist.

7. Whatever action it takes, Congress should consider the relationship between that action and a number of laws, including the National Environmental Policy Act (NEPA) and existing antipollution statutes.

(a) The effect on the environment of requiring large users of natural gas to switch to alternative fuels may be substantial.

(b) Environmental impact statements may be time consuming and may be incompatible with the implementation of emergency procedures, if not their development.

8. To the extent that it enacts legislation authorizing allocative procedures by government agencies, whether on the Federal, State, or local level, Congress should ensure the use of suitable and adequate administrative procedures.

(a) To the maximum extent feasible, each agency should develop its policies and regulations as far in advance of an actual emergency as possible and do so by using the procedures of § 553 of the Administrative Procedure Act and Recommendations 72–5 and 76–3 of the Administrative Conference.

(b) For the determination of matters that involve any specifically identifiable party, agencies should, to the maximum extent feasible, use procedures that assure the party adequate notice, opportunity to present facts and positions, a statement of the basis for decision, and reasonable administrative appeal.

CONSULTANT AND STAFF REPORTS
IN SUPPORT OF
RECOMMENDATIONS
75–1 through 77–3

REPORT IN SUPPORT OF RECOMMENDATION 75–1

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In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies*

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In terms of both size and economic importance, the banking business plays a pre-eminent role in the United States. At the end of 1973, commercial banks, mutual savings banks and savings and loan associations held over a trillion dollars in total assets. There were almost 20,000 separate institutions, of which 6,699 were federally chartered; an additional 11,750 state chartered institutions had federal deposit insurance from the Federal Deposit Insurance Corporation (FDIC)[1] or Federal Savings and Loan Insurance Corporation (FSLIC).[2]

Along with the federal involvement and support goes an extensive structure of federal regulation. National banks are chartered and supervised by the Comptroller of the Currency, and automatically receive deposit insurance from the FDIC. State banks are chartered and supervised by the different state banking authorities; in addition, they may join the Federal Reserve System (and thus automatically receive FDIC insurance) or the FDIC itself, thereby incurring a secondary level of regulation and supervision.

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[1] Originally created by Act of June 16, 1933, ch. 89, § 8, 48 Stat. 168.

[2] Originally created by Act of June 27, 1934, ch. 847, tit. IV, § 402, 48 Stat. 1256.

Federal savings and loan associations are chartered and regulated by the Federal Home Loan Bank Board (hereafter FHLBB or Bank Board) and are automatically insured by the FSLIC. State savings and loans may also join the FSLIC to obtain insurance of accounts. Tables 1 and 2 provide a statistical picture of the jurisdiction of the various federal banking agencies.

Since its institution in the early 1930s, federal deposit insurance has gained widespread popularity and acceptance and is now regarded as a virtual necessity for any new bank or savings and loan; over ninety-seven percent of banking assets are held by insured institutions. Whether directly through control over chartering or indirectly through control over insurance of deposits, therefore, the federal banking agencies determine entry into the banking business. Moreover, through their approval powers over branches for existing banks and savings and loans, the federal banking agencies can to a large degree control entry into new markets and further influence the structure of banking competition.

These are not unimportant powers, but they have not been the focus of much public attention. This study inquires into the way these powers have been and now are exercised, and it suggests changes in regulatory procedures. The influence that the courts have exerted over these procedures will also be examined with some care.

We will begin with the area of primary supervision and direct licensing controls: approvals by the Comptroller of the Currency of charters and branches of national banks, and by the Federal Home Loan Bank Board of charters and branches for federal savings and loan associations. In the case of the Comptroller, it will be necessary to analyze a rather long and complicated sequence of cases in some detail—partly to convey a picture of past difficulties, and partly to understand the posture in which the agency now finds itself vis-à-vis the judiciary. Then we will turn to the area of secondary supervision: decisions to admit state chartered banks to membership in the Federal Reserve System (FRS) or in the Federal Deposit Insurance Corporation, or to approve their branches; and decisions to admit state savings and loans to membership in the Federal Savings and Loan Insurance Corporation. In both instances we will be concerned with how much discretion has been vested in the agency in question, and the grounds and manner of its exercise.

Thereafter we will look at these decisions in more statistical terms—in aggregate results for all four agencies over the period of the last five years, and in a sample study of decision files for the

Table 1
Number and Total Assets (in billions of dollars)
of Banks—December 31, 1973

	Banks										
		Commercial Banks							Mutual Savings Banks (State)		
			FDIC Insured								
				FRS Member Banks			Nonmember Banks (State)				
	All Banks	Total	Total	Total	National	State	FDIC Insured	Non-insured	Total	FDIC Insured	Non-insured
Number	14,653	14,171	13,964	5,735	4,659	1,076	8,229	207	482	322	160
percent of total	100	96.7	95.3	39.1	31.8	7.3	56.1	1.4	3.3	2.2	1.1
Total assets	$942.4	835.8	827.1	656.3	489.5	166.8	170.8	8.7	106.6	93.0	13.6
percent of total	100	88.7	87.8	69.6	51.9	17.7	18.1	.9	11.3	9.9	1.4

Sources: 60 Fed. Res. Bull., Table A16 (July 1974); 1973 FDIC Annual Report, Table 108.

Table 2
Number and Total Assets (in billions
of dollars) of Savings and Loan Associations—
December 31, 1973

	Savings and Loan Associations								
		FHLB Member Associations							Nonmember Noninsured Associations (State)
			FSLIC Insured					Noninsured (State)	
				Mutual			Stock (State)		
Item	All Associations	Total	Total	Total	Federal	State			
Number	5,244	4,311	4,163	3,571	2,040	1,531	592	148	933
percent of total	100	82.2	79.4	68.1	38.9	29.2	11.3	2.8	17.8
Total assets	$272.4	266.4	264.8	209.7	152.2	57.5	55.1	1.6	5.9
percent of total	100	97.8	97.2	77.0	55.9	21.1	20.2	.6	2.2

Sources: U.S. Savings and Loan League, 1974 Savings and Loan Fact Book, Tables 49, 50, 91, 92, 103; FSLIC Data.

Comptroller. Based on all these materials, some concluding observations and recommendations will be offered.

I. PRIMARY APPROVALS

A. The Statutory Foundation

The national banking system and the office of the Comptroller of the Currency as its administrator were established by the National Bank Act of 1864,[3] which superseded the National Currency Act of 1863.[4] The language of those acts of over a century ago is reflected today in sections 12 through 27 of the United States Code. "Associations for carrying on the business of banking" may be formed by five or more natural persons, who must enter into and sign articles of association, a copy of which is to be forwarded to the Comptroller.[5] The organizers must also execute and file with the Comptroller an organization certificate, giving among other things the bank's name, place of operation, and amount of capital stock.[6] The amount of capital required by law ranges from $50,000 in localities with a population of no more than 6000 to $200,000 in cities with a population of over 50,000.[7] Upon receiving this information, the Comptroller is to

> examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; . . .[8]

If upon that examination "it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate . . . that such association is authorized to commence such business."[9] The Comptroller is authorized to withhold the certificate only when "he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter."[10]

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[3] Act of June 3, 1864, ch. 106, 13 Stat. 99.

[4] Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.

[5] 12 U.S.C. § 21 (1970).

[6] *Id.* §§ 22-23.

[7] *Id.* § 51.

[8] *Id.* § 26.

[9] *Id.* § 27.

[10] *Id.*

On its face, the statute does not seem to grant the Comptroller broad discretion to determine whether a community should have a new bank.[11] This fact bothered the district court in *Pitts v. Camp*,[12] and yet that court declared itself "impressed with the long and continued practice of the Comptroller of considering the need of the community [and] with the fact that the weight of authority accepts the consideration by the Comptroller of the need factor without question."[13] The court then cited *Sterling National Bank of Davie v. Camp*,[14] which had asserted: "It has always been recognized that this legislation confers vast discretion on the Comptroller to approve or disapprove a new charter application."[15]

These decisions considerably overstate the matter. It has not "always been recognized" that the National Bank Act confers vast chartering discretion upon the Comptroller, and it has not been his "long and continued practice" to assert such discretion. The dominant views of the mid-nineteenth century favored "free banking," as part of the general trend towards "free incorporation"—the idea that charters to do various kinds of business should be readily available to anyone who complied with relatively simple and specific statutory requirements, rather than be grants of special privilege by the legislature to those who obtained (or bought) its favors. New York and Michigan passed free-bank laws in the 1830s, and by the time of the Civil War roughly half the states had adopted similar measures.[16] The National Currency Act and the National Bank Act were designed as free-bank laws, and with that origin in mind their language becomes perfectly comprehensible.[17]

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[11] The Court has difficulty in seeing language in those sections giving the Comptroller discretion in granting the certificate if the specific requirements of the act are met. . . .

> The statutory language, which the defendant contends makes the need of the new bank a proper consideration and commits the determination of that need to the Comptroller's discretion, does not impress the court.

Pitts v. Camp, 329 F. Supp. 1302, 1307 (D.S.C. 1971), *vacated*, 463 F.2d 632 (4th Cir. 1972), *vacated and remanded*, 411 U.S. 138 (1973).

[12] *Id.*

[13] *Id.* at 1307.

[14] 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971).

[15] *Id.* at 516.

[16] R. ROBERTSON, THE COMPTROLLER AND BANK SUPERVISION 22-23 (1968). This is an official history of the Office of the Comptroller.

[17] *See generally id.* at 44-45. *See also* B. HAMMOND, BANKS AND POLITICS IN AMERICA 727 (1957); 2 F. REDLICH, THE MOLDING OF AMERICAN BANKING 99-105 (1968). In practice, the first Comptrollers tried on occasion to make their own judgments felt, but the legal footing for their efforts was minimal. "The law did not require the organizers to satisfy the Comptroller that they were qualified to engage in the banking business, that additional banking facilities were needed, or that the proposed bank had reasonable prospects of success." Wyatt, *Federal Banking Legislation*, in BANKING STUDIES 44 (F.R.B. 1941).

For a period of a decade following the Civil War, limitations on the amount of national bank-note circulation served indirectly to limit chartering of national banks, but when that condition ended in 1875 national bank charters were available for every qualifying group.[18] For the balance of the nineteenth century, Comptrollers not only recognized but proclaimed their lack of chartering discretion—for example, Comptroller Knox in 1881: "[T]he Comptroller has no discretionary power in the matter, but must necessarily sanction the organization . . . of such associations as shall have conformed in all respects to the legal requirements."[19]

A shift in position did not begin until 1908, when a new Comptroller took office on the heels of the Panic of 1907,[20] and it did not become established policy until the 1920s.[21] This new approach did not acquire a respectable statutory foundation, however, until the Great Depression led to the creation of the Federal Deposit Insurance Corporation[22] and enactment of the Banking Act of 1935.[23] The latter enactment required the Comptroller, when he chartered a new national bank, which automatically would become an insured bank, to certify to the FDIC that he had "considered" the same six factors that the FDIC was supposed to consider in passing upon the application for insured status of a state nonmember bank:[24] "The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes" of the Federal Deposit Insurance Act.[25] In this somewhat backhanded fashion the law recognized—or, more accurately, created—the Comptroller's chartering discretion. To the extent that there are standards governing that discretion, therefore, they are to be found in the Federal Deposit Insurance Act, not the National Bank Act.

Turning to the subject of branching, we find that it goes without mention in the National Bank Act of 1864.[26] This legislative omission was regarded by early Comptrollers as prohibiting branch banking by national banks,[27] a view that was confirmed by the Attorney General in 1911[28] and ultimately by the Supreme Court in 1924.[29] Meanwhile, branching by state banks had become extensive in a number of states, and considerable pressure built up for allowing national banks to do likewise. During the 1920s the Comptroller responded by approving "consolidations" as a device for obtaining branches and by authorizing "offices" that were almost branches.[30]

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[18] R. Robertson, *supra* note 16, at 57-61.

[19] 1881 Comp. Curr. Ann. Rep. 11.

[20] R. Robertson, *supra* note 16, at 66-69.

[21] *Id.* at 95-96.

[22] The FDIC was created by Act of June 16, 1933, ch. 89, § 8, 48 Stat. 168.

[23] Act of Aug. 23, 1935, ch. 614, § 101, 49 Stat. 684, 688, *amending* 12 U.S.C. § 264.

[24] 12 U.S.C. § 1814 (1970).

[25] *Id.* § 1816.

[26] Act of June 3, 1864, ch. 106, 13 Stat. 99.

A more satisfactory answer was achieved with the passage of first the McFadden Act of 1927,[31] which permitted national banks to have "inside" branches (located in the same city as the head office), and then the Banking Act of 1933,[32] which authorized "outside" branches (located elsewhere in the state), in both cases only to the extent state law expressly authorized such branches for state banks and subject to certain additional capital requirements. Assuming the geographical and capital requirements were satisfied, a national bank could establish, operate or move a branch only with the "approval" of the Comptroller.[33] No standards were provided to govern the grant or denial of approval.

The statutory picture for the Federal Home Loan Bank Board is less complicated. Section 5 of the Home Owners' Loan Act of 1933[34] authorized the FHLBB, "giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States," to provide for the organization, chartering, and operation of federal savings and loan associations. Section 5(e) of the Act went on to provide the following standards:

> No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.[35]

The Home Owners' Loan Act of 1933, like the National Bank Act of 1864, made no reference to the subject of branches. Nevertheless, the Bank Board from the outset took the position that it had the power to authorize branches, and was upheld when ultimately challenged in court.[36] The statute even today is silent on branching and obviously contains no standards to affect the FHLBB's discretion when passing upon branch applications by federal savings and loans.

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[27] R. Robertson, *supra* note 16, at 81-85.

[28] 29 Op. Att'y Gen. 81 (1911).

[29] First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640 (1924).

[30] R. Robertson, *supra* note 16, at 100-04.

[31] Act of Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1228.

[32] Act of June 16, 1933, ch. 89, § 23, 48 Stat 189.

[33] 12 U.S.C. §§ 36(c), (e) (1970).

[34] Act of June 13, 1933, ch. 64, § 5, 48 Stat. 132.

[35] 12 U.S.C. § 1464(e) (1970).

So by different routes the two agencies emerge at about the same point. Both face a short list of general standards in the relevant statutes for charter approvals, and no standards whatever for branch approvals. Furthermore, the charter standards are either too narrow or too unspecified to serve as much of a guide for or restraint upon the exercise of discretion. Of the Comptroller's list of six factors, the first ("the financial history and condition of the bank") is inapplicable to new charters and the last (corporate powers "consistent with the purposes" of the Act) is a routine formality.[37] The second and third ("adequacy of its capital structure" and "future earnings prospects" for the Comptroller, "reasonable probability of its usefulness and success" for the Bank Board) do have content, but depend on a conjectural exercise in financial prediction. The fourth ("general character of its management" for the Comptroller, "persons of good character and responsibility" for the Bank Board) imposes a minimal constraint, occasionally in issue but capable of being met by millions of possible applicants and thousands of possible managing officers. It is therefore the fifth ("the convenience and needs of the community to be served" for the Comptroller, "a necessity . . . for such an institution in the community to be served" and establishment "without undue injury to properly conducted existing local thrift and home-financing institutions" for the Bank Board) that in most cases serves as the ground for decision. For convenience, this latter criterion will be referred to simply as the "need" factor.

Standards so judgmental and indefinite constitute in effect a delegation by the legislature to the administrative agency of the task of developing public policy in this area. We shall next examine the manner in which the two agencies have done so.

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[36] First Nat'l Bank of McKeesport v. First Fed. Sav. & Loan Ass'n of Homestead, 225 F.2d 33 (D.C. Cir. 1955); North Arlington Nat'l Bank v. Kearny Fed. Sav. & Loan Ass'n, 187 F.2d 564 (3d Cir.), *cert. denied*, 342 U.S. 816 (1951). In its branch regulation, the FHLBB has simply repeated the statutory charter standards. *See* 12 C.F.R. § 545.14(c) (1974).

[37] A simple prohibition of the exercise of inconsistent powers would suffice. *Cf.* 12 C.F.R. § 332.1 (1974).

B. Decision Procedures and Judicial Review: Pre-1965

One way for an agency to develop law and policy is by undertaking comprehensive studies, followed by the issuance of detailed policy statements or regulations. Neither the Office of the Comptroller nor the FHLBB has availed itself of this approach. On occasion, general statements of "philosophy" appear in public speeches or annual reports,[38] but they have never been carried to the point of providing enlightenment as to how a particular application might fare.

Another way to develop policy is by the common law method of case-by-case adjudication. In the period since the Comptroller began regularly exercising approval discretion in the 1920s and the Bank Board started performing that function for federal savings and loans in the 1930s, the two agencies have passed upon thousands of applications for charters and branches, granting some and denying others. Their procedures, however, have been quite informal and customarily have not entailed providing written opinions or explanations of the decisions.

If one had consulted the Comptroller's regulations at the beginning of 1959 for information on how to obtain approval for a new bank or a branch, he would have found that the application was routed through various levels of the agency, with recommendations attached at each stage,[39] but without any form of public hearing. A field examiner would make an "investigation" of the application, gathering unspecified kinds of economic and market data and visiting existing banks in the locale to ask for their views. The applicant would not know what the investigator turned up, and objectors would not generally know even what was in the application, let alone the examiner's report. On request, an applicant or objector would usually be given a "conference" with the Regional Comptroller or another representative, without the presence of other parties, at which he could voice his opinions on matters that he thought might be relevant to the outcome. "Among other matters to be considered" in the case of a new bank charter, the regulations stated, were the six factors enumerated in section 1816 of title 12 of the United States Code.[40] For a branch application, the regulations listed additional factors:

> [T]he number of branches now in operation and their location, the proposed location of the new branch and the distance

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[38] *See, e.g.*, 1964 COMP. CURR. ANN. REP. 2-4.

[39] 12 C.F.R. §§ 4.1, 4.5 (1959).

[40] *Id.* § 4.1(b). A modified version is now contained in 12 C.F.R. § 4.2(b) (1974).

> from the head office, the nearest banking facilities, . . . the nature of the potential clientele and possible business available, including an estimate of contemplated volume within a reasonable period of time and the prospects of successful operation of the branch together with any other pertinent factors.[41]

The process of evaluation whereby these relevant "factors" were translated into a decision was not described in any published source available beforehand, and the applicant would know nothing more if ultimately he was turned down: "If the decision is unfavorable the applicants are so informed."[42] In its entire history, the Office of the Comptroller had never held a public hearing on an application nor published a written opinion.[43]

Over at the FHLBB, applicants and their opponents were faring better procedurally but not substantively. The Bank Board customarily released charter and branch applications to the public and scheduled public hearings[44] on either a "dispensable" or "nondispensable" basis.[45] Information concerning the grounds for decision was about as hard to come by, however, as with the Comptroller. For charter applicants, the regulations merely required data "sufficiently detailed and comprehensive to enable the Board to pass" upon the four statutory criteria; in the case of branch applications, the regulations required an applicant to

> state the need for such branch office; the functions to be performed; the personnel and office facilities to be provided; the estimated annual volume of business, income, and expenses of such branch office; and [submit] a proposed annual budget of such association.[46]

How such data eventuated in a grant or denial of the application was not vouchsafed to the applicant in any form of written opinion, however, leaving the actual policies of the Board as obscure as those of the Comptroller.

This state of affairs was not viewed critically by authorities in administrative law. In its 1941 report, the Attorney General's Committee on Administrative Procedure stated, in a passage cherished by the banking agencies:

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[41] *Id.* § 4.5(a)(1) (1959).

[42] *Id.* § 4.1(d) (charters); *id.* § 4.5(a)(3) (branches).

[43] Bloom, *Hearing Procedures of the Office of the Comptroller of the Currency*, 31 LAW & CONTEMP. PROB. 723 (1966).

[44] 12 C.F.R. §§ 543.2(c), 545.14, 542.2 (1959).

[45] *See* Breisacher, *Practice and Procedure Before the FHLBB*, 16 BUS. LAW. 146, 148 (1960).

[46] 12 C.F.R. § 545.14 (1959).

> The Committee recognizes, however, that . . . in determining whether individuals are suited to engage in a banking business, or whether the community needs the bank, or whether a bank should be insured and similar questions, a congeries of imponderables is involved, calling for almost intuitive special judgments so that hearings are not ordinarily useful . . . .[47]

The Attorney General's Committee therefore did not recommend that the banking agencies be covered by the formal hearing requirements of the proposed legislation, and ultimately they were not so covered by the Administrative Procedure Act of 1946.[48] Professor Kenneth C. Davis in his *Administrative Law Treatise* visited the same area in 1958 and found that all was well:

> Probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision, and almost entirely without formal adjudication, is the regulation of national banks. The regulation of banking may be more intensive than the regulation of any other industry, and it is the oldest system of economic regulation. The system may be one of the most successful, if not the most successful. The regulation extends to all major steps in the establishment and development of a national bank, including not only entry into the business, changes in status, consolidations, reorganizations, but also the most intensive supervision of operations through regular examination of banks.
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> . . . .
>
> The striking fact is that whereas the non-banking agencies administer their systems of requiring licenses and approvals by conducting formal adjudications in most cases involving controversies, the banking agencies use methods of informal supervision, almost always without formal adjudication, even for the determination of controversies. . . .
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> Even though important groups in the nation are applying pressures to try further to judicialize the administrative process, a close study of the methods of supervision used in the regulation of banking, as compared with the methods of determinations on a record of formal proceeding, might well

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[47] Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 142-43 (1941).

[48] Act of June 11, 1946, ch. 324, 60 Stat. 237. Technically this is because the requirements of section 5 only apply to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing," and as is evident the banking statutes do not so require for this class of decisions. *See* 5 U.S.C. § 554(a) (1970); *cf.* United States v. Florida East Coast Ry., 410 U.S. 224, 241 (1973) (rulemaking); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-57 (1972) (same).

> prove that the nonbanking agencies have a good deal to learn from the banking agencies. Banking regulation is obviously superior in its efficiency; if, as those who are regulated seem generally to believe, banking regulation fully measures up in qualities of overall fairness, then the only major question remaining is relative effectiveness from the standpoint of protection of the public interest.[49]

The same attitude prevailed in court when judicial review of a decision was sought. To begin with, there was no provision in the National Bank Act or in the Home Owners' Loan Act authorizing court review of charter and branch decisions. Thus, the only hope of obtaining review would be an original proceeding in a district court, probably in the form of an action for an injunction or declaratory judgment, and there was considerable doubt as to whether the Comptroller's decisions were reviewable at all.[50] So far as reported decisions show, no denied applicant or competing bank had ever even tried to take the Comptroller to court over a charter decision, and of course the nature of the applicable statutory standards made the prospects of success in such a proceeding rather uninviting. The branch law, on the other hand, by incorporating state law geographical restrictions,[51] posed the possibility of narrow and specific grounds of difference with the Comptroller's position, and so cases were undertaken. A denied applicant lost in *Michigan National Bank v. Gidney*,[52] but did succeed in obtaining declaratory judgment review. In 1958 the Comptroller was for the first time enjoined from authorizing a branch, in *National Bank of Detroit v. Wayne Oakland Bank*,[53] and in 1959 he was enjoined again in *Commercial State Bank of Roseville v. Gidney*.[54] All of those cases involved the question of violation of state law requirements as to location and did not challenge the Comptroller's judgment on approval or disapproval as such.

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[49] 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.04 (1958). Professor Davis's position had become more critical by 1966. *See* Davis, *Administrative Procedure in the Regulation of Banking*, 31 LAW & CONTEMP. PROB. 713 (1966).

[50] *See* Stokes, *Public Convenience and Advantage in Applications for New Banks and Branches*, 74 BANK. L.J. 921, 930 (1957): "Well informed opinion is that there is no right of appeal from a decision of the Comptroller of the Currency."

[51] 12 U.S.C. § 36(c) (1970):

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> . . . .
>
> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

[52] 237 F.2d 762 (D.C. Cir.), *cert. denied*, 352 U.S. 847 (1956).

For the Bank Board, the picture was not much different. It had never been challenged on a charter decision, and the only branch challenges were to its authority to authorize branches at all[55] and not to its exercise of discretion in a particular case.

The story of the attempt to obtain review of branch and charter decisions really begins with *FHLBB v. Rowe*[56] in 1960, and the beginnings were not auspicious. As in most of the early cases, the grounds primarily relied on were procedural. The plaintiff in *Rowe*, a denied charter applicant, contended that he was entitled to a hearing conducted by the Board in accordance with Administrative Procedure Act (APA) specifications. The District of Columbia Circuit not only rejected that contention but went on to suggest that judicial review of a charter decision would be available, if at all, only under rather narrow circumstances, noting that Congress had "clearly reposed in the Board a wide discretion" and had "not in the Act provided for judicial review of the Board's order."[57]

In the context of branch applications, the APA-hearing-entitlement argument had already been tried without success,[58] so the plaintiff in *Bridgeport Federal Savings & Loan Association v. FHLBB*[59] instead attacked the form of Board hearing actually held. According to the complaint, the hearing was inadequate to satisfy procedural due process, since it involved restricted opportunity for cross-examination and denial of access to internal reports and information upon which the Board relied in approving a competitor's branch application. In upholding the Board, the Third Circuit saw the hearing as playing a limited and even minor role in the decision process:

> The rulings of the Board are the result of its expert judgment, its policy, the reports, recommendations and analyses of its

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[53] 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958).

[54] 174 F. Supp. 770 (D.D.C. 1959), *aff'd*, 278 F.2d 871 (D.C. Cir. 1960).

[55] *See* text and note at note 36 *supra*.

[56] 284 F.2d 274 (D.C. Cir. 1960).

[57] *Id*. at 275, 277.

[58] First Nat'l Bank of McKeesport v. First Fed. Sav. & Loan Ass'n of Homestead, 225 F.2d 33, 36 (D.C. Cir. 1955).

[59] 307 F.2d 580 (3rd Cir. 1962), *cert. denied*, 371 U.S. 950 (1963).

> staff, plus any special evidence it might conclude necessary to obtain by way of hearing.[60]

The culmination of such judicial deference was expressed at about this same time in *Community National Bank v. Gidney*,[61] when a competing bank attempted to overturn a branch approval by the Comptroller on two grounds—not only violation of state law location requirements, but also lack of "necessity" for establishment of the branch. In order to show that the Comptroller had abused his discretion, plaintiff moved for discovery of documents in the Comptroller's files relating to the examination and evaluation of the branch application. The court's response was unequivocal:

> In passing on branch applications, the Comptroller must necessarily utilize his great expert knowledge and consider questions of policy, as well as of fact, with respect to the interest of the public; coordination with other federal and state supervisory agencies; and banking conditions in general.
>
> In view of the above cases and considerations, and especially in view of the failure of Congress to provide any standards by which this court could determine whether the exercise of discretion by the Comptroller was "reasonable" or whether it was "arbitrary", this court is of the opinion that Congress intended that the Comptroller have an exclusive and unreviewable power of discretion in determining whether or not to approve the establishment of branch banks pursuant to 12 U.S.C.A. § 36(c). The Court, therefore, is further of the opinion that the discretion provided for in 12 U.S.C.A. § 36(c) comes within the second exception to Section 10 of the Administrative Procedure Act and that this court is without jurisdiction to review the action of the Comptroller in the present case.[62]

The full reach of that language implied that the Comptroller could not be reviewed and reversed by a court even for an unmistakenable violation of the state law location requirements of section 36(c) of title 12 of the United States Code, and of course there was already ample precedent to the contrary on that point.[63] It is not surprising that the district judge later modified his position;[64] yet, if confined to the issue of how far to review a banking agency's ultimate judgment in approving or disapproving a charter or branch, the passage shows an attitude that was pervasive at the time.

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[60] *Id.* at 584.

[61] 192 F. Supp. 514 (E.D. Mich. 1961).

[62] *Id.* at 518-19.

[63] *See* text and notes at notes 53-54 *supra*.

[64] *See* Community Nat'l Bank v. Saxon, 310 F.2d 224, 225 (6th Cir. 1962).

By the early 1960s, then, the licensing decisions of the Comptroller and the Bank Board were as impenetrable a mystery—or "congeries of imponderables"—as ever. Neither policy statements nor regulations provided a clear understanding of why decisions came out as they did, and no written opinions were issued at the end of the process to provide at least retrospective enlightenment. Competing banks were able to get a court to look at and at times overrule the Comptroller's constructions of state law branch location requirements but otherwise he was having no difficulty defending his results in court.[65] This period proved to be the high-water mark of judicial deference to the Comptroller's informal ways and unexplained actions, and the tide turned swiftly.

C. The *Smithfield* Case and Its Aftermath

The landmark decision came in 1965: *First National Bank of Smithfield v. Saxon*.[66] It presented the familiar situation of a competing bank objecting to the Comptroller's approval of a branch, but the Fourth Circuit came at the problem from an unfamiliar angle. The plaintiff had won in the district court on the ground that the APA required the Comptroller to conduct an adversary hearing.[67] The Fourth Circuit, as had others before it, rejected this argument, holding that neither the APA nor the requirements of procedural due process commanded that the Comptroller proceed by way of an adversary hearing.[68]

But then the court turned to the question of how, in the absence of a trial-type hearing and findings based on an evidentiary record, judicial review could be achieved. As the majority of the panel saw it, a "substantial evidence" scope of review was out of place in these circumstances; instead, it remanded the case to the district court for a trial de novo:

> On the remand of this case, the plaintiff may adduce evidence demonstrating the impermissibility of the Comptroller's

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[65] *See, e.g.*, Continental Bank v. National City Bank, 245 F. Supp. 684 (N.D. Ohio 1965); Bank of Dearborn v. Saxon, 244 F. Supp. 394 (E.D. Mich. 1965), *aff'd*, 377 F.2d 496 (6th Cir. 1967); Peoples Bank of Trenton v. Saxon, 244 F. Supp. 389 (E.D. Mich. 1965), *aff'd*, 373 F.2d 185 (6th Cir. 1967); Commercial Sec. Bank v. Saxon, 236 F. Supp. 457 (D.D.C. 1964).

[66] 352 F.2d 267 (4th Cir. 1965).

[67] First Nat'l Bank of Smithfield v. First Nat'l Bank of E. North Carolina, 232 F. Supp. 725 (E.D.N.C. 1964).

[68] First Nat'l Bank of Smithfield v. Saxon, 352 F.2d 267 (4th Cir. 1965).

> approval of a branch bank at Smithfield. Testimony to the contrary will be receivable from the Comptroller. The Court will then find the facts. Thereon, it will judge de novo the validity, in fact and in law, of the Comptroller's final action.
>
> . . . If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded, or arbitrarily applied his discretion.[69]

The problem seen by the majority in trying to "review" a totally unexplained decision was undeniably real, but the dilemma created by its solution was effectively pointed out by Judge Sobeloff in dissent:

> How can the District Court conduct a proper examination if the Comptroller has not disclosed what issues he is resolving? The District Court is told to make its own de novo fact-findings, but it is still in no position to judge how far the Comptroller's decision rests upon fact-findings which the court deems erroneous and how far it is an exercise of discretionary judgment. . . .
>
> The Comptroller has not divulged his mental processes, and his determinations of fact, rulings of law and exercises of discretion and judgment are inextricably intermingled. The District Court is thus placed in the unhappy position of choosing between two equally unacceptable alternatives. Either it must blindly assume that the Comptroller's discretion rests upon an adequate basis in fact, in which event the court review almost inevitably becomes a meaningless gesture; or the District Court, proceeding upon the basis of facts independently determined by it, must act in ignorance of the nature of the decision it is reviewing, in which case the court's judgment is liable to usurp the Comptroller's function.[70]

The course of judicial review since *Smithfield* can be seen in precisely the terms Judge Sobeloff predicted: a fluctuation between the unsatisfactory poles of futility and usurpation.

The latter outcome promptly became evident in *Bank of Haw River v. Saxon*.[71] Finding the Comptroller's hearing inadequate, the district court proceeded with review de novo, and in the process became Comptroller for a day. On the basis of the testimony in court, which went "far beyond that which was before the Comptroller,"[72] the judge defined the service or trading area of the branch and concluded that the area was "already considerably over-banked. Since the present ratio of existing banking offices to population is far in excess of both State and National averages, there can be no question but that the existing banks, with resources well in excess of two billion dollars, amply meet the capital needs of the Graham-Burlington area."[73] The judge also decided that, due to a slow rate of population growth in the locale, it would not be economically feasible to establish a new banking facility in the area. He concluded: "No public interest, need or necessity has been shown for the establishment of a branch of First National in Graham, North Carolina, and it is impermissible for the Comptroller to approve the establishment of such a branch."[74]

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[69] *Id.* at 272.

[70] *Id.* at 274.

[71] 257 F. Supp. 74 (M.D.N.C. 1966).

When the grounds for decision are made explicit, as in *Haw River*, it becomes possible to subject them to examination and critique, and the opinion in *Haw River* certainly shows the risks that such scrutiny entails for the decision maker. The ratio of banking offices to population in a somewhat arbitrarily defined service area, as compared with state and national averages, had become the measure of need—a measure that, in the very nature of an average, would lead to the conclusion that something like half of the country at any given time is "over-banked", and always will be, which might lead one to question either the suitability of the measure or its significance.

From the Comptroller's standpoint, however, the most important aspect of a decision like *Haw River* is that it demonstrated the potential of de novo review for taking over his functions—not necessarily performing them more poorly, but depriving him of one of the major sources of the power and prestige of his office.

Efforts were soon made to extend *Smithfield*'s de novo review to a theretofore sacrosanct area: charter decisions. In *Webster Groves Trust Co. v. Saxon*,[75] the Comptroller was for the first time subjected to judicial review of a charter decision, in this instance at the behest of a competing bank objecting to a grant, but the Eighth Circuit refused to take the additional step of review by trial de novo.

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[72] *Id.* at 79.

[73] *Id.*

[74] *Id.* at 80.

[75] 370 F.2d 381 (8th Cir. 1966).

> The Comptroller is free to exercise his discretion in the granting of charters, free from any review on the merits of his action. However, if the Comptroller acts in excess or abuse of his legal authority, to this extent his actions are subject to judicial review, with the burden of proof resting on the party seeking the review.[76]

Of course, if the Comptroller never disclosed the basis for his action, it would be rather difficult for the party seeking review to show an abuse of discretion. In effect, this was the other pole of Sobeloff's dilemma: the futility of judicial review.

When a charter case came before the Sixth Circuit in *Warren Bank v. Camp*,[77] it adopted a more qualified position on the scope of review, reading the branch and charter cases together as conferring on the district courts "a considerable discretion in determining the form of review required."[78] In this blurring of prior distinctions, a trial de novo would not be required for every complaint, but only where the plaintiff had made out "a prima facie case of abuse of discretion."[79] In an effort to do that, plaintiff moved to take the depositions of the Comptroller and several subordinates, but this was denied, absent a showing of "a prima facie case of misconduct."[80] "What appellant seems to us to seek is an opportunity to depose the Comptroller in order to probe his mind as to exactly why he saw fit to exercise his discretion as he did in relation to the grant of this charter. This appellant clearly was not entitled to do,"[81] noted the court, citing *Morgan IV*.[82] The result was to suggest that review de novo might be available even in the charter area, but to establish preconditions that seemed unlikely of fulfillment.

Even if the effects of *Smithfield* were to be largely confined to branch cases, however, that was still quite enough to have a major impact on the Comptroller's office. The *Smithfield* court had grounded the need for review by trial de novo on the Comptroller's "unilateral procedure," which, lacking any form of adversary hearing, deprived his fact findings of "the preferred position accorded by the substantial-evidence rule" and of any "opening-presumption of correctness."[83] To regain that preferred position, the

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[76] *Id.* at 388.

[77] 396 F.2d 52 (6th Cir. 1968).

[78] *Id.* at 56.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] United States v. Morgan, 313 U.S. 409, 421-22 (1941).

[83] First Nat'l Bank of Smithfield v. Saxon, 352 F.2d 267, 272 (4th Cir. 1965).

Comptroller's office in 1966 set about redoing its procedures.[84] Most of the application and field examiner's report were made available to the parties, and "conferences" with a member of the Comptroller's staff were replaced by "hearings" with all parties present, of which a transcript was kept. The Comptroller even began preparing written opinions in some contested branch cases in which litigation was anticipated. The result was to put the Comptroller in a position similar to that already achieved by the Bank Board, so that he was able to offer the reviewing court a fairly thick record, replete with data and arguments, instead of a mere order defended by procedural breastworks of burden of proof and prima facie case.

Under his new procedures, it became the Comptroller's tactic when confronted with a complaint to submit the administrative file to the court and move for summary judgment. The administrative file usually had portions deleted as confidential or protected by executive privilege—for example, when they involved reports of examination of a bank, intra-agency memoranda, derogatory letters, or trade secrets. But a good deal of data and testimony could be found scattered through the record and, in some cases, brought together in an opinion to justify the agency's conclusion.

The new procedures came back before the Fourth Circuit in *First-Citizens Bank and Trust Co. v. Camp*[85] and had the desired effect. The court found that the Comptroller had provided the "adversary hearing" that was lacking in *Smithfield*, even if the panel conducting the hearing before the Regional Comptroller was no more than "an investigatory or fact-gathering organ, not having any fact-finding function."[86] Plaintiff was therefore not entitled to a hearing de novo in the district court; instead, "the scope of review should not be more rigorous than the substantial evidence rule."[87] With the aid of the Comptroller's opinion, the court concluded that the substantial evidence test was met, and the branch approval was upheld. If a sigh of relief issued from the Comptroller's office, however, it proved to be short lived.

D. The Search for Standards

Another significant decision in the banking field had occurred in 1966, with the Supreme Court's construction of section 36(c) of title 12 of the United States Code in *First National Bank of Logan v.*

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[84] The following description is taken from Bloom, *supra* note 13, at 725-26.

[85] 409 F.2d 1086 (4th Cir. 1969).

[86] *Id.* at 1090.

[87] *Id.* at 1095.

Walker Bank & Trust Co.[88] That statute authorized "inside" branches[89] for national banks "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question." Utah had a "home office protection" type of branching law, which forbade banks from opening branches in a municipality in which other banks were operating, except by buying out one of the existing banks and taking it over as the branch. The then Comptroller, James J. Saxon, believed in aggressively expanding the powers and activities of the national banking system to their fullest statutory potential; he argued that the Utah statute "expressly authorized" branching and that was enough for section 36(c). Since in his view the Utah takeover restriction was a mere specification of "method" not incorporated by section 36(c), the Comptroller proceeded to authorize de novo branches for two Utah national banks.

The Supreme Court, in a unanimous opinion, gave the Comptroller short shrift:

> It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there "only to the extent that the State laws permit branch banking." Utah clearly permits it "only to the extent" that the proposed branch takes over an existing bank.
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> . . . As to the restriction being a "method," we have concluded that since it is part and parcel of Utah's policy, it was absorbed by the provisions of §§ 36(c)(1) and (2), regardless of the tag placed upon it.[90]

In itself, *Walker Bank* did not seem of great import, since it merely knocked down an attempt by the Comptroller to let national banks have de novo branches where state banks could not. But a number of lower courts started seeing more in it than that.

One of the problems in attempting to review decisions by the Comptroller under section 36(c) was that the statute contained no standards whatever for approving branches. Even under a limited scope of review like the substantial evidence test, it is necessary to ask: substantial evidence *of what*? It is possible to more or less duck the question when the court is deciding for itself, as in *Smithfield*'s review de novo, or is giving the form of review with little substance, as in telling the plaintiff that he has failed to discharge the burden of showing an unexplained decision to be arbitrary, but it is harder for a court to duck while at the same time it is maintaining that the decision rests on substantial evidence.

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[88] 385 U.S. 252 (1966).

[89] *See* text at notes 31-32 *supra*.

[90] 385 U.S. at 261-62.

In *First-Citizens*, the Fourth Circuit filled the void by using *Walker Bank* to incorporate in section 36(c) *all* the standards and findings required by North Carolina law and not just its restrictions on the "extent" of branching allowed state banks. North Carolina is a statewide branching state that does not restrict the "extent" of branching at all, but it does set certain standards for the exercise of the state bank commissioner's approval authority:

> Such approval shall not be given until he shall [find] (i) that the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or teller's window and of the existing bank or banks in said community.[91]

Although the Comptroller, with reason, argued that *Walker Bank* did not face and decide the question of whether such broad criteria, unrelated to either the geographical location of branches or the "manner" of obtaining them (by acquisition or de novo establishment), were intended to be imposed on the Comptroller by section 36(c), the general language in the opinion about not picking and choosing what portion of the law would bind him was apparently enough to cost him the day; the court held that he was bound by North Carolina's "need and convenience" and "solvency of the branch" criteria. The Fourth Circuit conceded that these were "nebulous concepts,"[92] resulting in a "lack of definitive direction,"[93] but at least they were better than the National Bank Act and provided the court with some basis for purporting to give substantial evidence review.

The Comptroller, consistently with his view of *Walker Bank*, had not expressly made even these vague findings in *First-Citizens*, but the court was willing to infer them from the general matters discussed in his opinion and the fact of his ultimate conclusion of approval. Although a number of other courts, both before and after *First-Citizens*, agreed with the proposition that section 36(c) incorporated all state law standards and findings, the Comptroller did not readily acquiesce and continued in many cases to omit express findings in the terms required by state statutes.[94] Furthermore, after 1971, the Comptroller cut back on the practice, begun in 1966, of writing opinions in contested branch cases.[95]

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[91] N.C. GEN. STAT. § 53-62(b) (1965), *quoted in* First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086, 1090 n.5 (4th Cir. 1969).

[92] 409 F.2d at 1091.

[93] *Id.* at 1094.

Since the reviewing courts were agreed that *Walker Bank* made any required state law findings binding upon the Comptroller,[96] they were in an awkward position. Some courts were willing to continue to find the necessary state law determinations "implicit" in the Comptroller's approval and review on that basis.[97] On occasion, the Comptroller wrote an opinion after the case went to court, and made the state law findings expressly.[98] But in other cases, where there were no opinions and no state law findings, the court was unwilling to indulge in implications and simply reversed the Comptroller outright and remanded to him for reconsideration.[99]

The matter came to a head in *First National Bank of Catawba County v. Wachovia Bank and Trust Co.*[100] In a one page per curiam opinion, the Fourth Circuit affirmed an injunction against the Comptroller's issuing a branch certificate: "[W]hen the Comptroller expressly declined to make the findings required by § 53-62(b), although he made numerous other findings, he acted arbitrarily and capriciously in approving Wachovia's application to establish a branch. . . ."[101] Faced with what amounted to a rule of automatic reversal, the Comptroller gave up and thereafter conceded, at least in the Fourth Circuit, that he was bound by state law findings requirements.[102]

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[94] *See, e.g.*, American Bank & Trust Co. v. Saxon, 373 F.2d 283, 291 (6th Cir. 1967); Citizens Nat'l Bank of S. Md. v. Camp, 317 F. Supp. 1389, 1392 (D. Md. 1970); Industrial State Bank v. Camp, 284 F. Supp. 900, 902-03 (W.D. Mich. 1968), *vacated as moot*, 421 F.2d 1361 (6th Cir. 1969).

[95] *Cf.* Clermont Nat'l Bank v. Citizensbank, 329 F. Supp. 1331, 1336 (S.D. Ohio 1971). The practice had in any event been largely devoted to North Carolina cases.

[96] This conclusion was somewhat strengthened by the citation of *Walker Bank* in First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122, 130 (1969), for the proposition that state law controls "when, where, and how" branches may be authorized for national banks. *See also id.* at 139 (Douglas, J., dissenting but agreeing with proposition stated).

[97] *See, e.g.*, Clermont Nat'l Bank v. Citizensbank, 329 F. Supp. 1331, 1344-45 (S.D. Ohio 1971); First Nat'l Bank of Fairbanks v. Camp, 326 F. Supp. 541, 545 (D.D.C. 1971), *aff'd*, 465 F.2d 586, 597 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1124 (1973). *Cf.* Farmers Nat'l Bank v. Camp, 345 F. Supp. 622, 629 (D. Md. 1971).

[98] *See, e.g.*, Citizens Nat'l Bank in Gastonia v. Wachovia Bank & Trust Co., 329 F. Supp. 585 (M.D.N.C. 1971).

[99] *See, e.g.*, Citizens Nat'l Bank of S. Md. v. Camp, 317 F. Supp. 1389 (D. Md. 1970).

[100] 448 F.2d 637 (4th Cir. 1971).

[101] *Id.* at 638.

What had been gained, or lost, in this running battle? The Comptroller apparently feared that his approval discretion would be hobbled by a tangle of state statutory findings and fought tenaciously to avoid it. Most state statutes, however, where they contained any standards at all, were as "nebulous" and lacking in "definitive direction" as the Fourth Circuit found North Carolina's to be,[103] or as the Comptroller's own earlier list of "pertinent factors."[104] By the same token, reviewing courts actually gained little in the way of standards or findings by which to examine a record for substantial supporting evidence. In any but a superficial sense, the Comptroller was about as free and the courts as much at sea as before. Looking ahead, it was possible that the state standards would gradually undergo a process of judicial construction and administrative interpretation that would give them real meaning, and perhaps it was this kind of development that the Comptroller sought to avoid.[105] For the moment, however, it made little real difference if the Comptroller was forced to express his conclusion in terms of boilerplate findings like "needs and convenience" and "public advantage" taken from state statutes.

E. Probing the Comptroller's Mind and Files

Although the Comptroller has under duress provided some form of opinion or findings at times in branch cases, charter decisions are another story. The Comptroller has never written an opinion in a charter case, and the courts have tended to regard his discretion in charter decisions as especially unfettered and their scope of review as correspondingly more narrow. For over a century the Comptroller was never taken to court over a charter decision, so far as the records show. The first party to do so was a competing bank complaining of a charter approval, in *Webster Groves*

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[102] Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643, 646 (E.D.N.C. 1972). In other circuits, the Comptroller has continued to resist. *See, e.g.*, First Bank & Trust Co. v. Smith, 509 F.2d 663 (1st Cir. 1975).

[103] *See* text and note at note 92 *supra*.

[104] 12 C.F.R. § 4.5(a)(1) (1959); *see* text and note at note 41 *supra*. This regulation was revoked on Feb. 14, 1963 (28 Fed. Reg. 1584), and has not been subsequently replaced by any list of a similar nature.

[105] However, state interpretations of state standards have not thus far been accorded much of a role under section 36(c). *See, e.g.*, First Bank & Trust Co. v. Smith, 509 F.2d 663, 666 n.2 (1st Cir. 1975); First Nat'l Bank of Fairbanks v. Camp, 465 F.2d 586, 593-97 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1124 (1973); Howell v. Citizens First Nat'l Bank of Ridgewood, 385 F.2d 528, 530 (3d Cir. 1967).

Trust Co. v. Saxon.[106] The Comptroller contended his action was not subject to judicial review and plaintiff had no standing, contentions that run through many of these cases with a uniform lack of success.[107] But if his decision was in principle reviewable, the absence of any opinion or explanation made review undeniably difficult. The court handled the case before it by putting on the plaintiff the burden of showing that the Comptroller had abused his authority, and then holding that burden unmet.[108]

Under the circumstances, how could the burden be met? Obviously, the plaintiff would have to find out the reasoning that had led the Comptroller to his conclusion before he could demonstrate something wrong with it. In *Warren Bank v. Camp*,[109] the plaintiff was denied the right to seek that information directly by taking the depositions of the Comptroller and several subordinates.[110] The only other possibility was careful examination of the administrative file, in the hope that internal memoranda and recommendations would disclose the basis upon which the final decision was made, and a number of cases tried to pursue such an examination.

It was an approach with inherent limitations—what would you learn about the reasoning behind the Comptroller's approval of a charter if, for example, what the file contained was staff memoranda recommending denial? That was the situation in *Sterling National Bank of Davie v. Camp*,[111] but there was a thick file " 'replete with evidence which would support either view,' "[112] and the court was untroubled:

> Although we cannot chart the subjectives of his discretionary decision, it was obviously based on a composite of many factors and much data. To say that one fact was erroneous and that another fact was askew is not to infest the Comptroller's exercise of discretion with the scent of arbitrariness or capriciousness sufficient to set aside his decision.[113]

In other words, the Comptroller might have some of his facts wrong, but since you couldn't tell what his reasoning process was, there was no way to be sure it made a difference, and the plaintiff loses again.

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[106] 370 F.2d 381 (8th Cir. 1966).

[107] They were finally laid to rest by Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970), and Camp v. Pitts, 411 U.S. 138 (1973).

[108] *See* text and notes at notes 75-76 *supra*.

[109] 396 F.2d 52, 56 (6th Cir. 1968).

[110] *See* text and notes at notes 77-82 *supra*.

[111] 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971).

[112] *Id.* at 516.

[113] *Id.* at 517.

In *Olsen v. Camp*,[114] the plaintiff was for the first time a charter applicant seeking judicial review of a denial, a category of case in which going to court is even more unrewarding because of the limited remedy available.[115] The plaintiff sought discovery of the administrative file, but the Comptroller claimed executive privilege for a substantial portion relating to the applicant group's background and connection to certain other banks with which the banking agencies were having supervisory differences. Since it seemed likely this was the primary ground of the decision in the case, the court was unwilling to simply uphold the claim; it ordered some of the documents produced and the rest submitted to it in camera for review, partial excision, and release.

Similarly, in *Klanke v. Camp*[116] the court ordered the Comptroller to release to the plaintiffs "all Government records pertaining to the denial of plaintiffs' charter application,"[117] though it later allowed part to be withheld. But the court itself characterized obtaining judicial review based on the administrative file as "a hollow victory," since the Comptroller would be "insulated from judicial interference merely upon evidencing a minimal basis in reason for his denial."[118] The accuracy of that characterization was subsequently borne out, when the Comptroller obtained summary judgment because the plaintiffs had not discharged the "onerous burden" of showing that the Comptroller's decision was "totally devoid of any rational foundation."[119]

There were also attempts in some of the branch cases to open up the administrative file more fully, in an effort to ascertain the basis for decisions. Thus, the protestant in *Citizens National Bank of Southern Maryland v. Camp*[120] wanted to know the full content of the application and administrative file, parts of which had been withheld as confidential. He obtained a judicial order that, after remand, any undisclosed material should be submitted to the court in a sealed record for in camera inspection.

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[114] 328 F. Supp. 728 (E.D. Mich. 1970).

[115] If a competing bank prevails in a challenge to a branch or charter approval, it gets an injunction and thereby blocks or delays the additional competition. But if an applicant were to successfully challenge a denial, it would not get an order to the Comptroller to issue the desired approval, for that would in effect be mandamus relief which is not available in so judgmental and discretionary an area. *See, e.g.*, Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 332 (1967). Instead, it would get a remand to the Comptroller with instructions to correct his errors and reconsider, a prize of dubious value if the Comptroller remains unfavorably inclined.

[116] 320 F. Supp. 1185 (S.D. Tex. 1970).

[117] *Id.* at 1188.

[118] *Id.*

[119] Klanke v. Camp, 327 F. Supp. 592, 593-94 (S.D. Tex. 1971).

[120] 317 F. Supp. 1389 (D. Md. 1970).

Over the course of the decade, therefore, the Comptroller had been forced to reveal most of the administrative file on branch and charter decisions, though he was still keeping a portion of it confidential, at least from litigants. Once revealed, however, it proved only moderately enlightening. For a court concerned only lest the Comptroller be doing something totally absurd or unfair, the contents of the file were generally sufficient to support an affirmance. But for anyone seeking to understand the Comptroller's values and policies and reasoning process, a file filled with varied and conflicting views of subordinates provided disappointingly little help.

F. The Renewed Assault

To sum up "progress" by 1971, then, the Comptroller had been led, or coerced, into adopting a more formalized hearing procedure. As revised anew in 1971,[121] the Comptroller's regulations required notice by publication of applications for branches or charters, and the Regional Administrator of the Comptroller's office was required to notify local banks.[122] On request, a hearing would be held, primarily as an opportunity for protestants to voice their objections. The application and field examiner's report and any filed objections were part of the public file, except to the extent parts were excluded as confidential.[123] At the hearing, the applicant would usually introduce his application and rest, leaving it to the protestants to call witnesses (whose attendance was voluntary and testimony unsworn) and submit evidence. Though all parties were in the dark as to the Comptroller's precise standards, if any, there was a customary pattern—the protestant would try to show that the described service area was too large, that when properly drawn it was overbanked already, and that the local economy was stagnant, while the applicant would try to show the opposite. A transcript would be kept, at the protestant's expense, which if counsel were adept would be " 'replete with evidence which would support either view' " and contain "many factors and much data."[124] Some time thereafter, the Comptroller would announce that he had approved or disapproved the application.

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[121] 36 Fed. Reg. 6888 (1971).

[122] 12 C.F.R. § 5.2 (1974).

[123] *Id.* at § 5.3. Most of the exclusions are based on claims that the information consists of either business trade secrets or derogatory comments on the applicant or protestants. Reliance on the latter raises problems familiar from the days of the employee loyalty/security programs. *Cf.* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 866 (1961); Greene v. McElroy, 360 U.S. 474 (1959). But in very few cases do such considerations seem to be of actual importance in the outcome. *See* text at note 214 *infra*.

If it was a charter case, the Comptroller never wrote an explanatory opinion, though when he was taken to court in *Klanke v. Camp*[125] he did submit an affidavit which "explained" his denial on all available grounds.[126] By restricting its scope of review and putting all the burden on plaintiff, the court was able to find such a purely conclusory "explanation", or none at all, sufficient.

For a while, the Comptroller wrote opinions in some branch cases, but then he decided to cut back. Under the new practice, apparently the Comptroller would wait to see if suit was filed, and then supply some explanation if necessary by requesting a remand for that purpose[127] or by simply mailing out a belated opinion.[128] The courts insisted that the Comptroller's opinion or administrative file in some way support the findings required by state law, but those too were "nebulous" and unhelpful.

In short, half a dozen years of litigation through numerous cases had accomplished remarkably little in understanding just why the Comptroller decided as he did.[129] Once again, judicial patience wore thin, and a series of reversals for the Comptroller followed.

The district court in *Bank of New Bern v. Wachovia Bank & Trust Co.*[130] contemplated North Carolina's nebulous standards for branches and felt "constrained to establish its own guidelines," coming up with a list of seven factors.[131] The court then applied these factors to the record evidence and Comptroller's opinion, attached its own weights, concluded that there would not be substantial evidence to support an approval, and accordingly granted the plaintiff summary judgment against the Comptroller. *New Bern* is not far removed from *Haw River*[132] in its willingness to take over the Comptroller's function, though it employed the language of substantial evidence review rather than review de novo.

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[124] *See* text and notes at notes 111-13 *supra*.

[125] 320 F. Supp. 1185 (S.D. Tex. 1970).

[126] The Comptroller informed the court that he

> was convinced, among other reasons, that there was no adequate need for a banking facility at the proposed location; that the ability and experience of the proposed organizers was insufficient, that the requested new bank would not be successful under its proposed leadership; that the objects contemplated by the National Bank Act would not be served; and that the granting of the charter application would be detrimental to the public interest.

Id.

[127] *See, e.g.*, Farmers Nat'l Bank v. Camp, 345 F. Supp. 622, 624 (D. Md. 1971).

[128] *See* Citizens Nat'l Bank in Gastonia v. Wachovia Bank & Trust Co., 329 F. Supp. 585, 586 (M.D.N.C. 1971).

[129] In 1969 Professor Davis thought he could discern a significant trend in the Comptroller's office toward reasoned opinions and controlled discretion, but the trend unfortunately died a-borning. *See* K. Davis, Discretionary Justice 120-26 (1969)

[130] 353 F. Supp. 643 (E.D.N.C. 1972).

[131] *Id.* at 647-48.

In *Pitts v. Camp*,[133] the Fourth Circuit encountered its first case of charter review. Apparently there were no serious protestants, for no hearing on the application was requested or held. The Comptroller disapproved the application and as usual wrote no opinion, simply informing the applicant by letter that:

> On the basis of information developed by our Field Investigation, together with all other pertinent data relating to the proposal, we have concluded that the factors in support of the establishment of a new National Bank in this area are not favorable.[134]

Upon requesting and receiving reconsideration and submitting additional data, the applicant group got a letter of renewed denial and a glimmer of further explanation: "[W]e were unable to reach a favorable conclusion as to the need factor. The record reflects that this market area is now served. . . ."[135] The letter then listed one bank, two savings and loans and one credit union servicing the market area, which in no way distinguished the locale from a great many others in which the outcome had been favorable.

Instead of manipulating procedural rules and a narrow scope of review to sustain the Comptroller's ruling, the Fourth Circuit pronounced it "unacceptable." "It does not comply with the bare, fundamental principle of agency decision: that its basis must be stated."[136] The court cited *FTC v. Sperry & Hutchinson Co.*[137] and *Chenery I*[138] for the proposition that the "orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed . . . ."[139] The court remanded the case to the district court for a trial de novo, since the Comptroller had twice "inadequately and inarticulately resolved the appellants' presentation."[140] In essence, seven years after *Smithfield*, the court was back about where it started and again had recourse to review de novo as a means of putting pressure on the Comptroller to change his practices.

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[132] *See* text and notes at notes 71-74 *supra*.

[133] 463 F.2d 632 (4th Cir. 1972), *vacated*, 411 U.S. 138 (1973), *remanded*, 477 F.2d 593 (4th Cir. 1973).

[134] *Id.* at 633. This is the standard letter of denial.

[135] *Id.*

[136] *Id.*

[137] 405 U.S. 233 (1972).

[138] SEC v. Chenery Corp., 318 U.S. 80 (1943).

[139] 463 F.2d at 633.

The United States District Court for the District of Columbia took a different tack in *Wood County Bank v. Camp*,[141] in form a protestant's appeal from a charter approval.[142] The district court found what none before it had been able to find—a fifth amendment procedural due process requirement for findings and reasons by the Comptroller to support his decision, which the court characterized as adjudicatory in nature.[143] Although the court could muster little precedent for that requirement, it offered a number of "practical reasons" that it found compelling:

> The foremost of these is the facilitation of judicial review.
>
> . . . .
>
> . . . The Court is confronted here with an Administrative Record of over a thousand pages of testimony, complex technical data, and recommendations of the investigating National Bank Examiner and various members of the Comptroller's staff. For the Court to properly review such a record in as complex an area as the banking field and without the benefit of the Comptroller's underlying reasoning cannot expeditiously be done. As Mr. Justice Cardozo said . . . "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." . . .
>
> A second important reason for requiring findings is to prevent a reviewing Court from usurping the administrative fact-finding function. For a Court to refrain from such encroachment of administrative function, a Court must know what facts were found. . . .
>
> . . . .
>
> A third practical reason for administrative findings is to protect against careless or arbitrary action.[144]

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[140] *Id.* at 634.

[141] 348 F. Supp. 1321 (D.D.C. 1972), *vacated*, 489 F.2d 1273 (D.C. Cir. 1973).

[142] The substance was closer to a branch approval: the applicant was an existing bank, applying for a new charter as a branch-substitute in a unit banking state.

[143] 348 F. Supp. at 1325.

[144] *Id.* at 1326-27 (footnotes omitted).

The court therefore ordered the case remanded to the Comptroller to supply findings and conclusions "sufficient for the Court to grant Plaintiff the judicial review to which it is entitled."[145]

In increasing trouble once more, the Comptroller appealed *Wood County Bank* to the District of Columbia Circuit and took *Pitts* to the Supreme Court on a petition for certiorari.

G. *Pitts* and its Interpretation

The Comptroller in *Camp v. Pitts*[146] did not challenge before the Supreme Court the Fourth Circuit's holding that his letters of explanation were inadequate for judicial review,[147] but he did attack the procedure of remand to the district court for trial de novo. The Supreme Court agreed:

> It is quite plain from our decision in Citizens to Preserve Overton Park v. Volpe . . . that de novo review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding . . . . [T]he only deficiency suggested in agency action or proceedings is that the Comptroller inadequately explained his decision. As Overton Park demonstrates, however, that failure, if it occurred in this case, is not a deficiency in factfinding procedures such as to warrant the de novo hearing ordered in this case.[148]

Instead, said the Court, the proper remedy for an inadequate explanation is to get more, by way of either affidavits or testimony, to add to the administrative record. Since the Comptroller had already indicated the "determinative reason" for his denial,[149] that was the ground that had to be supportable on the record with the aid of the additional explanation.[150] If it was not, then the proper course was to vacate the Comptroller's decision and remand to him for further consideration.

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[145] *Id.* at 1329.

[146] 411 U.S. 138 (1973).

[147] 463 F.2d at 633-34.

[148] 411 U.S. at 141-42. De novo findings of fact and determination of the ultimate result should be distinguished from de novo review on questions of law; courts routinely review questions of law de novo in appeals from administrative decisions. *See* Seattle Trust & Sav. Bank v. Bank of Cal., 492 F.2d 48 (9th Cir. 1974).

[149] In the Court's rendition, this reason was "the finding that a new bank was an uneconomic venture in light of the banking needs and the banking services already available in the surrounding community." 411 U.S. at 143.

[150] The appropriate standard of review for this purpose, the Court also held, was that of section 10(e)(2)(A) of the APA: "whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.' " *Id.* at 142, *quoting from* 5 U.S.C. § 706(2)(A) (1970). The "substantial evidence" test was deemed appropriate for reviewing findings based on a hearing record, which the statutes in question here do not require. 411 U.S. at 141. Presumably, the former standard is a less demanding one al-

The Supreme Court therefore seemed to take away the only club the Fourth Circuit had found effective in trying to change the Comptroller's ways—de novo review. That method had always involved a more or less open intrusion upon the functions assigned to the Comptroller by Congress, and was therefore inappropriate, as the Court declared. What was regrettable was the Court's apparent unawareness of the eight years of running struggle between the Comptroller and the lower courts, in which effective judicial review had been frustrated determinedly and continuously.

On the other hand, the Court certainly left the door open for the lower courts to force explanations that they could find comprehensible. Indeed, as *Pitts* made clear, *Overton Park* had limited the rule of *Morgan IV*, about not probing into the mental processes of decision makers by deposition or examination as witnesses, to situations in which the decision maker had made formal findings on a record.[151] That overruled *Warren v. Camp*[152] and other cases holding that the Comptroller could not be examined or deposed, and if litigants pursued the opportunity it would become a new club of some force. If the Comptroller's inevitable objections about the burden on his office were not received sympathetically, he would almost surely move to forestall the embarrassments of cross-examination by providing fuller explanations—if not in contemporaneous opinions then through litigation affidavits. And if he did not, the court was free to remand.

But if the door to more intelligible explanation was still open, the general tenor of the opinion in *Pitts* was not very encouraging. This can best be shown by examining how lower courts have subsequently used or construed *Pitts*. The District of Columbia Circuit vacated *Wood County Bank* and remanded it to the district court for reconsideration in light of *Pitts*, and the district court felt constrained to grant the Comptroller's motion for summary judg-

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fording narrower review, but the distinctions involved have never been very clear. For example, would a finding not supported by evidence that was at least substantial not also be an abuse of discretion? Courts now know which language to use, but it is not evident that they will go about their job much differently; a district court subsequently considered the question in Grenada Bank v. Watson, 361 F. Supp. 728, 733 (N.D. Miss. 1973), *aff'd*, 488 F.2d 1056 (5th Cir. 1974), and found "no substantial difference" between the two standards. More recent and authoritative, if not more enlightening, discussion may be found in Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 95 S. Ct. 438, 441-42 (1974).

[151] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

[152] 396 F.2d 52 (6th Cir. 1968). *See* text and notes at notes 77-82 *supra*.

ment, though not without considerable protest.[153] The court concluded with a plaint that in cases like *Pitts* judicial review was impossible and with a plea to Congress to put the Comptroller under the hearings and findings requirements of the APA.

In *First National Bank of Homestead v. Watson*,[154] a competitor challenge to a charter approval, the court cited *Pitts* for the proposition that, absent a showing that his action was arbitrary or capricious, the Comptroller was under no obligation to explain his decision.[155] In *Grenada Bank v. Watson*,[156] the Comptroller had without opinion approved a branch on the basis of the usual thick hearing record plus brief and conflicting recommendations from subordinates; the court went back to implying state law findings and noting that the record contained evidence that might, on some theory, support them. *Pitts* was cited to the effect that the Comptroller's decision must be upheld unless the record indicates that it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . . ."[157]

The plaintiff in *Bank of Commerce of Laredo v. City National Bank of Laredo*[158] requested remand to the district court to obtain from the Comptroller some explanation of his charter approval as a branch substitute for the defendant, but was turned down flatly by the Fifth Circuit in a remarkably obtuse opinion. The court cited *Morgan IV* and the pre-*Overton Park* banking cases for the proposition that the plaintiff was barred by the "preponderant weight of judicial precedent" from deposing the Comptroller or requiring him to answer interrogatories.[159] *Overton Park* itself was ignored, and *Pitts* was cited as a recent affirmance of this policy, though the opinion had said the exact opposite.[160] The real point in *Laredo* was that the Fifth Circuit did not in that case feel any need for additional explanation to undertake judicial review,[161] and that in turn rested upon a willingness to hold the Comptroller to a generous and undemanding standard—the court was willing to glean from the staff recommendations and a "voluminous record" what "surely" was the determinative reason for the approval.[162]

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[153] [I]n the case at Bar the Comptroller attempted to explain in three short sentences his analysis of 1000 pages of economic data contained in the administrative record. . . . The Comptroller explained his determinative reasons for the action taken by stating summarily that the new bank would serve the convenience and needs of the relevant market and have no serious effect on the existing institutions now serving the general area. Under present requirements of procedural due process governing the Comptroller's decisions . . . the Court is constrained to deem the Comptroller's explanation sufficient.

Wood County Bank v. Camp, Civil No. 1277-72 (D.D.C., May 24, 1973), *aff'd*, 498 F.2d 1063 (D.C. Cir. 1974). *See* WASH. FIN. REP., at T-2 (June 4, 1973).

[154] 363 F. Supp. 466 (D.D.C. 1973).

[155] *Id.* at 468.

[156] 361 F. Supp. 728 (N.D. Miss. 1973), *aff'd*, 488 F.2d 1056 (5th Cir. 1974).

[157] *Id.* at 735.

[158] 484 F.2d 284 (5th Cir. 1973), *cert. denied*, 416 U.S. 905 (1974).

[159] *Id.* at 287.

[160] "If, as the Court of Appeals held and as the Comptroller does not now contest, there was such failure to explain administrative action as to frustrate effective judicial re-

In *Merchants & Planters Bank v. Smith*[163] the district court applied the limited scope of review of *Pitts* to a branch approval, suggesting it was sufficient if the Comptroller's determination had "a rational basis in fact."[164] Untroubled by the lack of any findings, conclusions, or opinion, the court pieced together conflicting file memoranda and constructed what it felt "the agency thinking" must have been. Needless to say, the Comptroller was sustained.

The only contrary note was *First National Bank of Fayetteville v. Smith*,[165] reversing the Comptroller's approval of a charter in a manner reminiscent of *Haw River*.[166] The recommendations of subordinates having gone four to one against approval, the court concluded that the Comptroller must have accepted and relied upon the grounds given in the one favorable recommendation, and that advice became in effect the Comptroller's findings to be tested against the record.[167] After noting that the standard for review was whether the Comptroller's action was arbitrary or capricious, or had no rational basis in the record, the court then waded through the record—considering how much capital would be adequate, choosing one expert over another on the bank's earnings prospects, judging whether the "need" would be better met by branches, and weighing the qualifications of the applicant group and proposed managing officer. Subsequently, however, the Eighth Circuit reversed this decision on the ground that the district judge, though stating the correct standard of review, had actually exercised an independent judgment in place of that of the Comptrol-

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view, the remedy was not to hold a de novo hearing but, as contemplated by Overton Park, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." Camp v. Pitts, 411 U.S. 138, 142-43 (1973).

[161] 484 F.2d at 288.

[162] *Id.*

[163] 380 F. Supp. 354 (E.D. Ark. 1974).

[164] *Id.* at 356.

[165] 365 F. Supp. 898 (W.D. Ark. 1973).

[166] *See* text and notes at notes 71-74 *supra*.

[167] 365 F. Supp. at 904.

ler;[168] the failure of the Comptroller to provide even a hint as to how his own judgment had been arrived at occasioned no adverse comment at all.

So judicial review of the Comptroller's decisions that is both limited and intelligent seems to be a goal that is as far away as ever. Even without trial de novo, there still seems to be only the unattractive choice between pro forma endorsement and taking over the policy judgments that were supposed to be the duty of the Comptroller. An intermediate role for the courts is simply not feasible unless the Comptroller can and will provide a clear and consistent explanation of what he is doing, and that has not been forthcoming.

H. The FHLBB Revisited

Meanwhile, during what for the Comptroller was a most turbulent decade, the Federal Home Loan Bank Board has sailed along with remarkably little disturbance. It is true that the Bank Board had no state law limitations on branches[169] to raise issues of interpretation and lead to litigation, and also that the Board was from the outset willing to hold hearings and build up a record for court inspection. The Board's position was therefore much less vulnerable than the Comptroller's; there were fewer obvious points of attack. And certainly early decisions like *Rowe*[170] and *Bridgeport Federal*[171] would be discouraging to any would-be litigant.[172]

But as the Comptroller's judicial battles created new doctrines, some of them had a clear potential for application to the Board as well. And in 1970 the Board amended its rules for charter and branch applications,[173] reducing the trial-type hearing that it had been holding for many years to a procedure involving the submission of written protests and an opportunity for brief oral argument thereon.[174]

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[168] First Nat'l Bank of Fayetteville v. Smith, 508 F.2d 1371 (8th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3439 (U.S. Feb. 4, 1975) (No. 963).

[169] Except to the extent the Board has imposed them on itself by regulation. *See* Lyons Sav. & Loan Ass'n. v. FHLBB, 377 F. Supp. 11 (N.D. Ill. 1974); 12 C.F.R. § 556.5(b)(1) (1974).

[170] FHLBB v. Rowe, 284 F.2d 274 (D.C. Cir. 1960). *See* text and notes at notes 56-57 *supra*.

[171] Bridgeport Fed. Sav. & Loan Ass'n. v. FHLBB, 307 F.2d 580 (3d Cir. 1962). *See* text and notes at notes 59-60 *supra*.

[172] These decisions were reinforced by some of the observations about the Board's "exclusive discretion" in Central Sav. & Loan Ass'n of Chariton v. FHLBB, 293 F. Supp. 617, 623-24 (S.D. Iowa 1968), *aff'd*, 422 F.2d 504, 507 (8th Cir. 1970), which upheld the Board's authority to permit federal savings and loans to operate "mobile facilities," a sort of traveling branch.

[173] *See* 35 Fed. Reg. 2509, 2510-12 (1970).

New attacks by competing associations were, nevertheless, as unsuccessful as before. In *Guaranty Savings & Loan Association v. FHLBB*[175] the court upheld this truncated "oral argument" procedure, and seemed to suggest that the Board's discretion over branching was so wide as to constrict judicial review almost to the point of nonexistence. And in *Benton Savings & Loan Association v. FHLBB*[176] the Board's resolution of branch approval in conclusory boilerplate was likewise sustained, the court noting that *Pitts* had been construed "to relieve the Comptroller and, by analogy, the Home Loan Bank Board of any obligation to state with specificity the reasons for their decision."[177]

In 1974 the Board carried this truncation process yet another step, amending the branch regulation to make oral argument available to a competitor only if it had filed a "substantial" protest.[178] In theory, this ever-widening divergence from the model of decisions based upon evidentiary hearings is going to increase the risk that a court will hold the agency's factfinding procedures inadequate; the Supreme Court in *Overton Park* listed that conclusion as one of the two grounds that would justify de novo review.[179] Yet so far the courts have not developed the same disenchantment with the Board's decision making that the Comptroller has managed to evoke, and the evident possibility seems but a distant cloud.[180]

II. SECONDARY APPROVALS

Next we turn, more briefly, to the role of federal banking agencies with respect to state-chartered institutions. A state agency is the primary supervisor for such institutions, making decisions on charter and branch approvals and otherwise regulating their investments and activities. But access to federal deposit insurance is controlled by federal agencies and is for practical purposes as necessary to commencement of operations as a charter.[181] In admitting state institutions to membership and thereby to deposit insurance, therefore, the Federal Reserve Board (FRB), Federal Deposit Insurance Corporation, and Federal Savings and Loan Insurance Corporation perform a sort of secondary charter approval function. Likewise, when a bank gets approval for a branch from its state supervisor, it also has to obtain approval from the FRB or, if not a member of the Federal Reserve System, from the FDIC. There is, however, no counterpart requirement for insured savings and loans to get branch approval from the FSLIC.

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[174] 12 C.F.R. §§ 543.2(e), (f) and 545.14(g), (h) (1974).

[175] 330 F. Supp. 170 (D.D.C. 1971).

[176] 365 F. Supp. 1103 (E.D. Ark. 1973).

[177] *Id.* at 1104. The Board has, however, written opinions in letter form since 1968 in some cases where litigation was anticipated, and has said that its present policy is to issue explanatory opinions whenever requested.

[178] 39 Fed. Reg. 789 (1974). This is in line with the Bank Board's current "general policy . . . to encourage expansion through branching;" *see* 12 C.F.R. § 556.5(b)(5) (1974), which also contains the wonderfully elusive warning that protests "will have to be increasingly persuasive" to have any effect.

[179] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

[180] The most recent tranquil acceptances of the Board's branch procedures are to be found in Lyons Sav. & Loan Ass'n v. FHLBB, 377 F. Supp. 11 (N.D. Ill. 1974) and Elm Grove Sav. & Loan Ass'n v. FHLBB, Civil No. 72-C-305 (E.D. Wis., Mar. 3, 1975).

In performing these secondary approval functions, particularly for branches, one would expect the federal agencies to play a narrower and more limited role than the primary supervisor making the initial determination; but the process is not wholly an automatic endorsement of what the state has approved. Although the court cases are few, the general picture is not dissimilar to the one we have traced for primary approvals: a dearth of standards, a lack of hearings, and the absence of opinions.

A. Federal Reserve Board

A state bank desiring membership in the Federal Reserve System makes application to the system's Board of Governors "under such rules and regulations as it may prescribe";[182] by way of standards the statute merely states that the Board "shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes" of the Federal Reserve Act.[183] The "financial condition" factor is amplified somewhat by the requirement that a bank may not be admitted to membership "unless it possesses capital stock and surplus which, in the judgment of the Board . . . are adequate in relation to the character and condition of its assets and to its existing and prospective deposit liabilities and other corporate responsibilities."[184] In addition, for a newly organized state bank that is not already insured, the

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[181] *See* Tables 1 & 2, p. 237 *supra*.

[182] 12 U.S.C. § 321 (1970)

[183] *Id.* § 322.

[184] *Id.* § 329.

Board must certify to the FDIC that it has "considered" the list of six factors contained in section 6 of the Federal Deposit Insurance Act.[185] The rules and regulations prescribed by the Board for membership applications are to be found in Regulation H,[186] which consists primarily of an assemblage of the pertinent statutory provisions and is thus not informative about additional bases of decision.

For the establishment of branches by a state member bank, the approval of the FRB must be obtained.[187] The statute says nothing whatever about approval standards, and the regulation merely notes that the request for approval "should be accompanied by advice as to the scope of the functions and the character of the business which . . . will be performed by the branch and detailed information regarding the policy . . . proposed to be followed with reference to supervision of the branch by the head office. . . ."[188]

There are no reported cases challenging either approvals or denials of membership or branch applications. In *Apfel v. Mellon*,[189] the petitioner sought mandamus to force the FRB to approve an application to form an Edge Act corporation,[190] another vehicle for engaging in foreign banking; the argument was over whether the statutory reference to approval by the FRB imported the exercise of judgment and discretion, and the court held that it did. And in *Old Kent Bank & Trust Co. v. Martin*[191] there is one judge's comment that, as to branches, "[s]ince 12 U.S.C.A. § 321 incorporates the policy of Section 36, the Board's discretion over state member banks must be construed as broadly as that of the Comptroller of the Currency."[192]

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[185] *Id.* § 1814. *See* text and note at note 25 *supra*.

[186] 12 C.F.R. § 208 (1974). *See also* 12 C.F.R. § 265.2(f)(26) (1974).

[187] 12 U.S.C. § 321 (1970). This has been construed to apply only to de novo establishment and not to acquisition of branches by merger. Old Kent Bank & Trust Co. v. Martin, 281 F.2d 61 (D.C. Cir. 1960). The distinction is now moot since the Board's approval must be obtained anyway for a merger in which a state member bank is the surviving party, 12 U.S.C. § 1828(c)(2)(B) (1970).

[188] 12 C.F.R. § 208(c) (1973). The FRB has delegated its authority to approve domestic branches to the regional Federal Reserve Banks and to the Director of the Division of Supervision and Regulation, in a manner that contains additional standards. 12 C.F.R. § 265.2(f)(1), (c)(10) (1974). For foreign branches, the Board exercises approval authority over national banks as well. 12 U.S.C. § 601 (1970); 12 C.F.R. § 213.3(a) (1974). If a branch is denied, the Board will provide a "simple statement" of the grounds. 12 C.F.R. § 262.3(e) (1974).

[189] 33 F.2d 805 (D.C. Cir. 1929).

[190] *See* 12 U.S.C. §§ 611 *et seq.* (1970).

[191] 281 F.2d 61 (D.C. Cir. 1960).

[192] *Id.* at 68 (dissenting opinion).

B. FDIC

When a state bank that is not a member of the Federal Reserve System applies for deposit insurance, the FDIC is supposed to "consider" the six factors which we have already noted[193] and also to "determine, upon the basis of a thorough examination of such bank, that its assets in excess of its capital requirements are adequate to enable it to meet all of its liabilities to depositors and other creditors as shown by the books of the bank,"[194] a requirement designed for operating banks rather than newly formed ones. The same six factors are to be considered by the FDIC in deciding whether to approve new branches for insured state banks that are not FRS members.[195] The regulations add nothing except some information about application forms and where to file them.[196]

There are no reported cases involving judicial review of FDIC decisions on membership and branch applications.[197]

C. FSLIC

The provisions governing applications for insurance of accounts by state chartered savings and loans[198] are to be found in section 1726(c) of title 12 of the United States Code:

> The Corporation shall reject the application of any applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe; and the Corporation may reject the application of any applicant if it finds that the character of the management of the applicant or its home financing policy is inconsistent with economical home financing or with the purposes of this subchapter. . . . In considering applications for such insurance the Corporation shall give full consideration to all factors in connection with the fi-

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[193] 12 U.S.C. § 1816 (1970). *See* text at note 25 *supra*.

[194] 12 U.S.C. § 1815 (1970).

[195] *Id.* § 1828(d).

[196] *See* 12 C.F.R. §§ 303.1, 303.2, 303.10, 304.3 (1973). Authority to approve branches, if certain conditions are met, has been delegated to the Director of the Division of Bank Supervision. 12 C.F.R. §§ 303.11(a)(7), 303.12(c) (1974).

[197] The nearest approach is Magellsen v. FDIC, 341 F. Supp. 1031 (D. Mont. 1972), a tort action for money damages against the FDIC which was dismissed for failure to follow the procedures required by the Federal Tort Claims Act; it contains some general references to the FDIC's discretion in passing on insurance applications.

[198] It is the "duty" of the FSLIC to insure the accounts of federal savings and loans. The FSLIC is run by the three-man Federal Home Loan Bank Board, which charters federal savings and loans; for federal associations, therefore, the insurance decision is essentially part of the chartering decision.

> nancial condition of applicants and insured institutions, and shall have power to make such adjustments in their financial statements as the Corporation finds to be necessary.[199]

In these applications, since a newly organized savings and loan will not have impaired capital and normally will assert that its financial and home financing "policies" will be whatever is necessary for approval, the pivotal statutory criteria become "the character of the management" and "all factors" in connection with financial condition. The regulations do not expand upon these rudimentary criteria, but do contain a description of internal processing[200] and a procedure for public notice of applications and opportunity for oral argument.[201] As we have previously noted, the FSLIC does not have any approval authority over the establishment of branches by state-chartered members.

There are no reported cases challenging FSLIC decisions to grant or deny insured status to an applying institution.

III. THE ADMINISTRATIVE DECISION PROCESS

Court cases and judicial opinions do not provide a comprehensive picture of agency decision making, since they are concerned with but a small and probably atypical fraction of all applications. We turn, therefore, to an overall statistical summary of the licensing decisions of the federal banking agencies, and then to a more detailed examination based upon a sample of actual decision files.

A. The Statistical Picture

The following tables show the licensing decisions of the four agencies over the five year period from 1969 to 1973, inclusive. These statistics must be interpreted with caution, however, for the policies followed by an agency, to the extent they are known and predictable, shape the applications it receives. A low percentage of denials, for example, would not necessarily mean an agency was following a course of automatic approval; it might mean only that applicants had a clear understanding of when to expect disapproval, and in those situations did not waste time applying. Nonetheless, there are some striking patterns revealed by the figures, and they correspond to the distinction between primary and secondary supervision already noted.

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[199] 12 U.S.C. § 1726(c) (1970).

[200] 12 C.F.R. § 571.6 (1974).

[201] *Id.* §§ 562.4, 562.5.

Table 3
Comptroller of the Currency Decisions
1969–1973

	1973	1972	1971	1970	1969	Total No. (Percent)
1. Charter applications	224	172	128	110	77	711 (100)
a. Approved	149	99	65	52	46	411 (58)
1) New	134	84	55	42	33	351 (49)
2) Conversion	15	15	10	10	13	63 (9)
b. Denied	70	63	57	48	25	263 (37)
1) New	69	60	54	46	24	253 (35)
2) Conversion	1	3	3	2	1	10 (2)
c. Withdrawn or abandoned	5	10	6	10	6	37(5)
1) New	4	10	5	9	2	30 (4)
2) Conversion	1	0	1	1	4	7 (1)
2. Branch applications*	1257	1070	917	987	1125	5356 (100)
a. Approved	1092	925	786	782	831	4416 (82)
b. Denied	119	116	104	152	200	691 (13)
c. Withdrawn or abandoned	46	29	27	53	94	249 (5)

* Excluding mergers.

Source: Comp. Curr. Ann. Reps. 1968-1973, Tables 4, 6, 8.

The Comptroller, with respect to applications for national bank charters and domestic branches, and the FHLBB, with respect to applications for federal savings and loan association charters and branches, act as primary supervisors, making the initial (and indeed the only) decision as to approval or rejection. Tables 3 and 4 present the data on their decisions. The rejection rates are high enough to be quite meaningful; over this most recent five year period, the Comptroller denied 13 percent of all branch applications and the Bank Board denied 18 percent. Putting aside conversions of existing state institutions to federally chartered institutions, the Comptroller denied 40 percent (253 out of 634) of the applications for new national banks and the FHLBB denied 61 percent (79 out of 129) of the applications for new federal savings and loans.

By way of contrast, the FRB, FDIC and FSLIC are in the position of secondary supervisors when they deal with institutions already chartered and regulated by state authorities. In performing their statutory approval function over branches for state banks, therefore, the FRB and FDIC are passing on issues previously dealt with by state banking departments. Although the question

Table 4
FHLBB Decisions
1969–1973

	1973	1972	1971	1970	1969	Total No. (Percent)
1. Charter applications	46	31	37	31	56	201 (100)
a. Approved	24	23	26	23	24	120 (60)
1) New	15	17	14	1	3	50 (25)
2) Conversion	9	6	12	22	21	70 (35)
b. Denied	22	8	10	8	32	80 (40)
1) New	22	8	9	8	32	79 (39)
2) Conversion	0	0	1	0	0	1 *
c. Withdrawn	0	0	1	0	0	1 *
1) New	0	0	0	0	0	0
2) Conversion	0	0	1	0	0	1 *
2. Branch applications**	1143 (465)	654	487	249	255	2788 (100)
a. Approved	1002 (391)	534	377	208	154	2275 (82)
b. Denied	140 (74)	119	102	41	101	503 (18)
c. Withdrawn	1 (0)	1	8	0	0	10 *

* Less than ½%
** Excluding mergers. (For 1973, limited service facilities are in parentheses.)
Source: FHLBB data.

of admission of a new applicant to system membership and deposit insurance is more of an initial decision, the factors that the FRB, FDIC and FSLIC consider under the relevant statutes are quite similar to those that state authorities were supposed to consider in their chartering decision, which precedes the membership application. The outcome is reflected in Tables 5, 6, and 7. The approval rate on branch applications was 99 percent for the FDIC and almost 100 percent for the FRB. On membership applications, the approval rate was 98 percent for both the FRB and the FDIC; only the FSLIC had a significant rejection rate of 30 percent. With this latter exception, it is apparent that the main area in which discretion is exercised, at least in a manner that applicants do not fully comprehend and anticipate, is in the decisions of those agencies that act as primary supervisors: the Comptroller of the Currency and the Federal Home Loan Bank Board.

B. A Closer Look—The Comptroller

In order to understand better the agency decision-making process, a study was made of a number of Comptroller's office de-

Table 5
FRB Decisions
1969–1973

	1973	1972	1971	1970	1969	Total No. (Percent)
1. Membership applications	30	19	14	8	10	81 (100)
a. Approved	29	19	13	8	10	79 (98)
1) Operating	3	6	4	0	3	16 (20)
2) New	26	13	9	8	7	63 (78)
b. Denied	0	0	0	0	0	0
1) Operating	0	0	0	0	0	0
2) New	0	0	0	0	0	0
c. Withdrawn	1	0	1	0	0	2 (2)
1) Operating	0	0	0	0	0	0
2) New	1	0	1	0	0	2 (2)
2. Domestic branch applications*	250	262	212	211	194	1129
a. Approved	250	262	212	210	193	1127
b. Denied	0	0	0	1	1	2
c. Withdrawn	0	0	0	0	0	0

* Excluding mergers. The FRB also during this period approved 416 applications for foreign branches of national and state member banks; one was denied and one withdrawn.

Source: FRB data.

Table 6
FDIC Decisions
1969–1973

	1973	1972	1971	1970	1969	Total No. (Percent)
1. Insurance applications	266	188	167	149	161	931 (100)
a. Approved	261	185	163	147	157	913 (98)
1) Operating	6	6	4	8	17	41 (4)
2) Proposed	255	179	159	139	140	872 (94)
b. Denied	5	3	4	2	4	18 (2)
1) Operating	0	0	0	0	0	0
2) Propsed	5	3	4	2	4	18 (2)
c. Withdrawn	0	0	0	0	0	0
2. Branch applications*	968	862	787	530	563	3710 (100)
a. Approved	961 (165)	848 (132)	773	527	556	3665 (99)
b. Denied	7	14	14	3	7	45 (1)
c. Withdrawn	0	0	0	0	0	0

* Excluding mergers. (For 1972-73, limited service facilities are in parentheses.)

Source: FDIC data.

Table 7
FSLIC Decisions
1969–1973

	1973	1972	1971	1970	1969	Total No. (Percent)
Insurance applications	49	20	19	19	18	125 (100)
a. Approved	39	12	11	11	11	84 (67)
b. Denied	9	8	7	8	5	37 (30)
c. Withdrawn	1	0	1	0	2	4 (3)

Source: FSLIC data. No breakdown between operating associations and proposed new associations was available.

cision files. That agency was chosen since it has figured in most of the significant judicial review litigation of the last decade and is the most important of the primary approval agencies in terms of the size of the industry segment it regulates.[202] A random sample was taken from charter decisions, branch approvals and branch denials over the 1969-1973 period; with the usual vicissitudes of files that were checked out or missing, the study group consisted of twenty-seven charter files (fifteen approved and twelve rejected), twenty-nine branch approvals, and thirty branch denials. These are fairly small samples, and the analysis based on them is intended to be suggestive, not conclusive. Nevertheless, it seemed desirable to look at the decision process from the inside, since no similar study had ever been undertaken.

1. *Charter Decisions*. The process formally begins when an "Application to Organize a National Bank"[203] is filed with the Regional Comptroller. This is a short form containing little more than the proposed name, locations, and initial capital of the new bank, together with rather long and detailed biographical and financial statements by each of the organizers.[204] The applicant is separately required to submit additional information, primarily on the issue of profitability: the location chosen, the population and economic character of the area the bank will serve, competing financial institutions in that area, and projections of deposit and loan growth and of income and expenses.[205] This information is frequently

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[202] *See* Tables 1 & 2 *supra*.

[203] Form CC 7022-16.

[204] Form CC 6021-05 and 7021-04. The Comptroller customarily also requires these forms from each director, officer and substantial stockholder (holding five percent or more of the stock) of the new bank.

[205] *See* Form CC 7022-18, set forth in the Appendix, pp. 297-98 *infra*.

provided in the form of a "market survey" prepared by a consulting firm.

The application is then assigned to a national bank examiner for a field investigation. His comments and findings are rendered[206] in two parts, the "Examiner's Report of an Investigation," which is available to the public, and the "Confidential Memorandum" to the Comptroller, which is not. The Examiner's Report summarizes some of the application information and gives a brief economic description of the service area and community, but contains little in the way of evaluation. That is provided in the Confidential Memorandum, on a number of topics. The examiner gives his views on how much initial capital the bank should have; he checks on the biographical and financial data furnished by the principal figures in the proposed bank and offers his conclusions about whether they are acceptable persons; and he answers questions such as these:

> 4. Is there a public need for the proposed bank or is the area reasonably well served by existing banks and branches? . . .
>
> 5. Is it reasonable to expect that the available banking business will be adequate to support the proposed bank, if established, together with existing competitive banks and branches, or will an overbanked situation be created? Indicate whether a healthy or unhealthy degree of competition will accrue.

He concludes by recommending either approval or denial of the application. Neither the form nor any standard instructions provide criteria by which these judgments and conclusions are to be reached; consequently, they rest largely on the personal attitudes of the examiner to whom the application was assigned.

The applicant has to publish notice of the filing of the charter application, and it is permissible, though uncommon, for objectors to request a hearing.[207] Otherwise, the application simply proceeds along a recommendation chain. The Regional Comptroller adds his comments and recommendation to those of the local examiner, and then the application goes to Washington, where three more recommendations are added—in turn, those of the Director of the Bank Organization Division, an Economist, and a Deputy Comptroller. These latter three recommendations are usually explained in a few sentences; the basis given for the other two recommendations is summarized in a paragraph or two. When the form arrives at the Comptroller's desk for final decision, he has five recommendations set forth on two pages. The Comptroller signifies his decision by signing on the approval or rejection line, without any statement of reasons.

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[206] *See* Form CC-1956-OX.

[207] 12 C.F.R. §§ 5.2, 5.4 (1974).

Although this decision procedure defies close analysis, as a number of courts have found out, it is possible to make some simple breakdowns, based on the sample of twenty-seven charter files. Table 8 shows the frequency with which the Comptroller agreed with the recommendations of his various subordinates. The Comptroller disagreed with his field examiner's view in almost half the cases, and with his more senior staff in about a quarter of the cases, on the average. The disagreements were mostly over implicit standards and values, for the examiner was the only one to undertake a significant factual investigation and there were few disputes along the recommendation chain over what could be called a matter of historical fact.

Table 8
Staff Recommendations and Comptroller's Charter Decisions
(1969–1973 Sample)

Comptroller's Decision	Approved (15)		Percentage of Disagreement	Rejected (12)	
Recommendations of	Approval	Rejection		Approval	Rejection
1. Examiner	10	5	44%	7	5
2. Regional Comptroller	9	6	30	2	10
3. Director, B.O.D.	10	5	33	4	8
4. Economist	11	4	27	3	8
5. Deputy Comptroller	13	2	11	1	11

Source: Comptroller's charter files.

Table 9 provides a picture of the extent to which these disagreements were clustered. It indicates the number of staff recommendations contrary to the Comptroller's decision in each case. In forty-one percent of the cases, the Comptroller and his staff were in complete agreement, but twenty-six percent of the time the Comptroller's decision was the opposite of the recommendation of a majority of his staff.

It is more difficult to get at the basis of these disagreements, since the Comptroller makes no statement of his reasons and the statements of the last three staff members in the recommendation chain are usually very brief and conclusory. In each case, however,

Table 9
Comptroller's Charter Decisions and Contrary Recommendations
(1969–1973 Sample)

No. of Contrary Staff Recommendations	Comptroller Approvals	Comptroller Rejections	Combined	
			No.	(Percentage)
0	7	4	11	41
1	3	2	5	19
2	1	3	4	15
3	0	3	3	11
4	3	0	3	11
5	1	0	1	4
TOTAL	15	12	27	100

Source: Comptroller's charter files.

a list was made of the factors cited by each staff member in support of his conclusion, and the factors were grouped into four broad categories: (1) factors related to predicting the bank's profitability, such as past or projected future economic growth of the community, the business available to a new bank, the accessibility of its location, and projections of loan and deposit growth and of income and expense; (2) characteristics of the application and applicant group, such as the reputation, financial strength and experience of the organizers, the distribution of stock ownership and its "local" character, and the adequacy of the proposed initial capitalization; (3) competitive aspects, such as the need for additional competition in the locale, the prospect for injury to other banks, and the operation of state laws limiting entry to certain markets; and (4) factors seen as bearing on the convenience and needs of the community, such as the absence or paucity of existing banking offices in the locale, or the existence of adequate service at the present time.

Attention was then focused on the thirteen cases in which the Deputy Comptroller agreed with the Comptroller and disagreed with one or more of his colleagues. In these cases disputes centered overwhelmingly on the matter of the "need" for a new bank. In twelve of the thirteen cases, the opponents of charter issuance viewed the locale as already adequately served and saw no indications of public need for a new bank. Those supporting charter issuance, on the other hand, most often cited rapid past or future growth of the area (nine cases), adequate capitalization of the proposed bank (eight cases), need for a new bank or added competition (eight cases), and the absence of any particular injury to existing banks (eight cases). The use and implications of these factors will be further discussed below.

2. *Branch decisions*. The procedure on branch applications is generally similar to that for charters. The application form[208] is a single page, but here too there is a requirement to submit additional information on competing institutions in the area to be served and the population and economic character of the locale.[209] A national bank examiner then makes his field investigation, which is again written up[210] in two parts—a publicly available Report and a Confidential Memorandum. The Report covers the same ground as the application, summarizing it and adding to it in a few respects. The Confidential Memorandum contains the examiner's comments on whether the bank has any problems "which may be considered as factors against branch expansion" and on whether any protests from other banks have "merit"; he lists what he believes to be the favorable and unfavorable factors and gives his opinion and recommendation. The Regional Administrator then adds his comments and recommendation.

At the Washington office, the recommendation chain differs slightly from the charter process. First comes the Director of the Bank Organization Division, as before. Then views are added either by one of the several Deputy Comptrollers with supervisory responsibility for different regions, or by the Chief National Bank Examiner. Next comes another Deputy Comptroller, and then the application goes to the Comptroller for his final decision. The recommendations of the Comptroller's subordinates are contained on two pages of the form, and the Comptroller's own decision is not accompanied by any indication of its basis.

Table 10 shows the frequency with which the Comptroller's branch decisions were in agreement with various subordinates' recommendations. As compared with Table 8 on charter decisions, the greater degree of agreement is striking. The same tendency is evident in Table 11; in no case was a majority of the staff recommendations contrary to the Comptroller's branch decision, and in seventy-eight percent of the cases there was unanimity.

The reasons for this greater consistency are not apparent. Where conflict did occur, it usually (fourteen out of eighteen times) took the form of a staff recommendation of approval for a branch application that the Comptroller denied; indeed, there was unanimity on only two-thirds of the denials, as compared to

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[208] Form CC 7024-01.

[209] Form CC 7024-06, which in many respects is identical to the charter form in the Appendix.

[210] *See* Form CC-1930-OX.

Table 10
Staff Recommendations and Comptroller's Branch Decisions
(1969–1973 Sample)

Comptroller's Decision	Approved (29)		Percentage of Disagreement	Denied (30)	
Recommendations of*	Approval	Denial		Approval	Denial
1. Examiner	25	2	15%	6	22
2. Regional Administrator	28	1	5	2	28
3. Director, B.O.D.	28	1	5	2	28
4. Chief Nat. Bank Examiner	5	0	5	2	3
or					
Deputy Comptroller	23	0		1	22
5. Deputy Comptroller	28	0	2	1	28

* In some instances, a recommendation was omitted.
Source: Comptroller's branch files.

Table 11
Comptroller's Branch Decisions and Contrary Recommendations
(1969–1973 Sample)

No. of Contrary Staff Recommendations	Comptroller Approvals	Comptroller Denials	Combined	
			No.	(Percentage)
0	26	20	46	78
1	2	6	8	14
2	1	4	5	8
3	0	0	0	0
4	0	0	0	0
5	0	0	0	0
TOTAL	29	30	59	100

Source: Comptroller's branch files.

ninety percent of the approvals. (Overall, it may be recalled, the Comptroller approved eighty-two percent and denied thirteen percent of all branch applications.[211])

When attention is centered on the cases involving disagreement, as before, the key issue seems to be whether the branch would be profitable. There was dispute over this in nine of the twelve cases; proponents cited rapid growth in the area and argued that other banks were doing well, while opponents contended that the area was adequately served, that profitability of the new branch was doubtful, and that the application was premature.

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[211] *See* Table 3, p. 274 *supra*.

3. *Decision grounds*. What can be said about the Comptroller's decision process and grounds for decision, as set forth in the application files? First of all, it is worth noting what factors do *not* seem significant in most cases. Consider the factors enumerated in section 1816 of title 12 of the United States Code, which constitutes the statutory framework for the Comptroller's exercise of chartering discretion: "[1] The financial history and condition of the bank, [2] the adequacy of its capital structure, [3] its future earnings prospects, [4] the general character of its management, [5] the convenience and needs of the community to be served by the bank, and [6] whether or not its corporate powers are consistent with the purposes of [the statute]."[212]

The first and second factors amount, in the case of a newly chartered bank, to its initial capitalization. In none of the sample cases was inadequate capitalization mentioned as an adverse factor or reason for denial, and for a rather simple reason: the applicants will generally either conform their application to the amount of initial capital which the agency indicates it deems desirable, or abandon the application as not feasible under the circumstances. For an operating bank seeking a branch, these factors have more content. But if there is serious supervisory concern over its management or capital adequacy or operating policies, a bank is made aware that there is no point in its applying for a branch at any location.[213] In effect, in both cases this issue is disposed of at an early stage and is not reflected in the final figures.

The fourth factor, the general character of management, was mentioned in some cases, but in fact was rarely determinative. A lot of the charter application routine bears on this factor—the long biographical and financial questionnaires required of the organizers and principal stockholders and proposed managing officers, and the investigation reports made on them by the field examiner. It is generally understood, however, that if the agency objects to any of these persons, he will be replaced or dropped from the applicant group, so this factor too does not often determine the final outcome.[214]

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[212] 12 U.S.C. § 1816 (1970). *See also* 12 C.F.R. § 4.2(b) (1974).

[213] This is made quite explicit in the FHLBB's treatment of "supervisory clearance"; *see* 12 C.F.R. § 556.5(a)(7) (1974). The withholding of branches is also used as a form of supervisory pressure on an institution to conform to what the agency regards as desirable operating policies and practices.

[214] The Comptroller insists that this part of the memorandum section of the examiner's report be kept confidential, to protect the anonymity of sources. The Comptroller's policy carries with it the distinct possibility of personal unfairness, since disqualification may

The sixth factor, corporate powers consistent with the purposes of the act, to the extent it has any meaning at all, is satisfied by the use of a prescribed form of articles of incorporation. It was never referred to in any way in any sample case.

That leaves factors three and five, future earnings prospects and the convenience and needs of the community; as already noted, these were the central points of disagreement in the recommendation chain. For branches, the debate was usually over whether the branch would be profitable, while for charters the issue was more often cast in terms of whether there was a "need" for a new bank. Analytical distinctions between the two factors were not clearly made, however. The discussion of community need sometimes, though not often, involved an assertion that the new entry would cause injury to existing banks or branches, but that argument shaded into the argument that there was not enough business for the new bank or branch to be profitable in the near future.

Most of the Comptroller's decisions, therefore, seem to turn on assessments of "need" and "profitability," and it is these two factors that warrant closer scrutiny. As it stands, each participant in the recommendation chain forms his own judgment as to profitability and reflects his own concept of need; there is no discussion of, or explicit agreement on, the underlying premises. Unless that consideration is systematically undertaken and articulated, the Comptroller's decision process will never be comprehensible, either internally or externally.

To afford an illustration of what would be entailed, let us explore these concepts somewhat further, from a critic's standpoint. What does it mean to inquire whether the community "needs" a new bank or branch? How is the public need for any new facility or service determined, whether it be a bank or a department store or supermarket? The answer for most products and services is whether the public is willing to patronize it enough and pay enough for it to be supplied at a profit—in other words, profitability is a measure of the extent of "need." It ensures that the social value of what is being provided, as measured by the public itself and what it is willing to pay, exceeds the social costs of supplying it. It is not apparent why this is not the standard of need to apply to banking offices as well. In the Comptroller's files there

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be founded on erroneous or distorted information that is not subject to correction or rebuttal.

are numerous examples of the use of much cruder standards—for instance, whether there are other banking offices that customers can go to without incurring what is, in the examiner's opinion, too much inconvenience, or whether a casual interview process with local businessmen turned up statements that they wanted a new bank. It is not at all clear that the "need" criterion does not resolve itself into the other key issue of profitability.

But why should the Comptroller be concerned with profitability? That factor is usually the worry of those who are financing a new venture; they have the most at stake and every reason to go into the matter as carefully as they can. It is hard to see why either superior sources of information or superior thoroughness of analysis would characterize the Comptroller's office as it grinds through hundreds of applications each year. It is as if a Washington agency had to approve each decision of a grocery chain concerning location of new outlets. A presumed agency expertise must find some rational foundation in its actual capacities, or it is an empty shibboleth.

But suppose we put aside the question of whether the agency or the applicant is in the better position to make judgments about the profitability of a particular location, and assume that applicants will make more mistakes than the agency will—how is the public interest thereby threatened? A bank simply closes down a branch that does not become profitable; rather than attempting to second-guess the bank's profitability estimate, the Comptroller could merely ascertain whether the bank could afford the cost of an error. Similarly, in the case of a new charter, the Comptroller could merely require that the amount of initial capital be sufficient to cover several years of operating losses.

A familiar rejoinder would be that we are concerned about the effects of a mistaken judgment, not merely or even primarily on the applicant, but on other institutions. In the jargon of the business, the concern is that new entry would lead to an "overbanked" condition. In more general terminology, the argument is that errors of entry judgment (which by assumption are made more often by applicants than by the agency) will at times produce excess capacity. Although long run excess capacity in an industry is normally corrected by elimination of the industry's less efficient facilities or firms, the argument continues, banking is a special case because the contraction may involve bank failure. At this point the argument tends to become either emotional or obscure. To some, the very words conjure up the collapse of the 1930s and the thought is unacceptable, though the fact is that several hundred banks have failed since the 1930s.[215] To others, apparently, a policy of preventing bank failures is viewed as having major benefits but no costs.[216]

A less extreme position would be that, while entry controls and a policy of failure prevention do have costs, they are outweighed by the benefits. But that position too is open to criticism on both theoretical and empirical grounds. For example, to what extent do entry controls actually prevent bank failure? At best (or worst), entry controls can confer a protected monopoly position on certain firms; that may be reflected in the present market value of the firm, but it does not constrain the future operations and policies of risk-acceptance by the firm. Nor is it easy to see the large metropolitan centers and national banking markets, in which the big banks operate, as protected monopolies; there are too many substantial competing firms. To the extent entry controls have successfully created monopoly positions (or "prevented overbanking," in the preferred phrase), it is probably in local markets and smaller towns. Is the purpose of entry controls mainly to prevent the failure of small banks? Why, and for whose benefit? Presumably, it is not to protect the stockholders; that is the very risk they undertake to bear. Perhaps to protect the depositors? But most of them are covered by deposit insurance; the smaller the bank, the higher tends to be the percentage of its deposits that are insured.[217] Deposit insurance merely transfers the loss to the FDIC, so perhaps the need is to protect the insurance fund? But the failure of small banks is the kind of event that the FDIC and FSLIC insurance funds can most easily handle, and there is little reason to doubt their adequacy for this purpose.[218]

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[215] *See* 1973 FDIC ANN. REP. 227 (Table 121).

[216] For a quite contrary view, see Tussing, *The Case for Bank Failure*, 10 J. LAW & ECON. 129 (1967). Some of the costs to bank customers are reflected in the monopoly franchise value that attaches to new charters upon approval, a phenomenon that troubles the banking agencies. Their response has been to block immediate resales of controlling stock, to limit attorneys' fees charged successful applicants, and in general to try to suppress the visible signs of the franchise value. *See, e.g.*, FHLBB, OUTLINE OF INFORMATION EX. G NO. 20 (1967, rev. 1969); FDIC, *Statement of Policy on Legal Fees*, 37 Fed. Reg. 17778 (1972).

[217] As of June 29, 1968, 75 percent of total deposits in banks with under $5 million in deposits were in accounts below the insurance ceiling (which was then $15,000), while in banks with over $100 million in deposits, the figure was 34 percent. *See* FDIC, SUMMARY OF ACCOUNTS AND DEPOSITS IN ALL COMMERCIAL BANKS 5 (1969). The insurance ceiling has now been increased to $40,000 by Pub. L. 93-495. And a family can have a number of insured accounts in the same institution. *See* Scott, *Some Answers to Account Insurance Problems*, 23 BUS. LAW. 493 (1968).

[218] There would be even less reason if the insurance corporations were not required to charge all firms a single rate regardless of individual risk. For a more comprehensive dis-

In short, the reasons for the Comptroller's concern with entry controls, and with overriding applicants' estimates of need and profitability, are by no means self-evident or self-validating. If it is to protect banks and their stockholders from losing money on poor site selections, it seems unwarranted. On this score, it also seems unsound, for it is hard to give credence to the proposition that on the whole the Comptroller's staff in Washington or in the field can judge the business potential of different locations across the entire United States better than the applicants can. If it is to protect depositors, or really the deposit insurance funds, from losses due to failures caused by "unhealthy" competition, it seems unnecessary on the one hand and largely impossible on the other. Among other things, there are too many sources of competitive pressure quite outside the Comptroller's control—not only state banks, and savings and loan associations, but also, increasingly in recent years, other investment media (such as mutual funds and direct investment in the capital markets) and other sources of loans (such as insurance companies, or direct access to the capital markets through commercial paper or variable-rate notes). It is not surprising, therefore, to find that economists have become dubious about the justification and effects of entry controls in banking.[219]

The foregoing discussion is not intended to reach a conclusion or be definitive, but merely to open up the kind of issues that the Comptroller should be facing in his administration of entry controls for national banks. What are the justifications and objectives of entry controls that the Comptroller believes have current validity? What determinations, concerning need or profitability or unhealthy competition or whatever, is he thereby required to make? On what sort of findings of fact are those determinations to be based?

The answers to those questions will not be obtained by opening up the "confidential" part of the Comptroller's files, as some of the cases[220] sought to do, for they cannot be found there either. So far as an examination of over a hundred branch and charter

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cussion, see Scott & Mayer, *Risk and Regulation in Banking: Some Proposals for Federal Deposit Insurance Reform*, 23 STAN. L. REV. 857 (1971).

[219] *See generally* Alhadeff, *A Reconsideration of Restrictions on Bank Entry*, 76 Q.J. ECON. 246 (1962); Meltzer, *Major Issues in the Regulation of Financial Institutions*, 75 J. POL. ECON. 482 (1967); Peltzman, *Bank Entry Regulation: Its Impact and Purpose*, 3 NAT. BANK. REV. 163 (1965).

[220] *See* text and notes at notes 111-20 *supra*.

files reveals, the problem is one of developing explicit answers and standards; they simply do not now exist.

Although this discussion has centered on the Comptroller, its applicability is not confined to him. In its essential characteristics, the branch and charter decision process of the FHLBB has the same shortcomings, though the Bank Board has much less often been taken to court. The purpose has been not to single out the Comptroller, but to use his procedures as a way of developing in some depth the problems presented by all the federal banking agencies in their licensing decisions.

IV. Conclusions and Recommendations

The judicial cases recounted in the first part of this paper demonstrated the determined resistance of the Comptroller and other agencies to providing applicants (and courts) with intelligible explanations of licensing decisions. The study of application files strongly suggests that at least one reason for that resistance is that there is no systematic and intellectually respectable basis for branch and charter decisions. Instead, there is a process of ad hoc recommendations and conflicting pressures, leaving fertile soil for a suspicion that the outcome can turn on political favoritism or outright corruption.[221] In essence, the banking agencies have failed to develop and announce public policy on these questions, although Congress, by enacting vague and general statutory standards, has in effect delegated to them a responsibility to do so.[222] This failure cannot be justified or excused on the basis of insufficient time for study or reflection or the accumulation of experience; the Comptroller's office has been in existence, and making such decisions, for over a century, and even the relative newcomers have had four decades.

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[221] The latest examples, involving charges of favoritism for Nixon supporters, have concerned the Comptroller's approval of a national bank charter for a group that included Dwayne O. Andreas, *see* N.Y. Times, Aug. 29, 1972, at 21, col. 6, and *id.*, Sept. 29, 1972, at 30, col. 1; the Comptroller's denial of a charter for a bank that would have competed with Charles Rebozo's Key Biscayne Bank & Trust Co., *see id.*, Oct. 17, 1973, at 27, col. 2; and the FHLBB's approval of account insurance for a new state savings and loan in Key Biscayne formed by Rebozo associates, *see id.*, Oct. 23, 1973, at 37, col. 4. *See also* 119 Cong. Rec. H 9236-37 (daily ed. Oct. 17, 1973); *id.* at E 6658-60 (daily ed. Oct. 18, 1973); *Hearings on Financial Structure and Regulation Before the Subcomm. on Financial Institutions of the Senate Banking, Housing, and Urban Affairs Committee*, 93d Cong., 1st Sess. 378-80 (1973).

[222] *Cf.* Morton v. Ruiz, 415 U.S. 199, 231-32 (1974): "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress . . . No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of the funds."

Why has this state of affairs been so long invulnerable to assault in the courts? Much of the explanation probably lies in the traditional view that an applicant for a bank charter or branch has no "right" to engage in the banking business at the desired location; he is merely a petitioner for a "privilege" bestowed by the government, a suppliant for an act of largesse. Thus, the argument runs, he has no recognized "property" interest calling for due process protection. This attitude is reflected in the almost unanimous holding that the Comptroller and other agencies are not constitutionally required to reach decisions by way of trial-type hearings.[223]

The right-privilege dichotomy, as a touchstone for due process analysis, has undergone a decline in recent years.[224] Welfare benefits were the classic case of governmental gratuities, to be dispensed in whatever manner the legislature might choose, but the Supreme Court in *Goldberg v. Kelly*[225] imposed the requirement of a fair evidentiary hearing before they could be terminated.[226] The category of property interests protected by procedural due process was enlarged to include government benefits to which a person claims he is entitled.[227] A "legitimate claim of entitlement"[228] may be based upon a statute whereby the government awards valuable benefits or privileges, just as much as upon contract or historically familiar forms of private property.

Although these cases show which way the wind is blowing, it is doubtful that the Comptroller's house has yet been toppled by them. They involve the termination of a preexisting (and thus relied upon) benefit or status, rather than an initial decision on an application, and that consideration is usually viewed as strengthening the claim that due process necessitates an evidentiary hearing.[229]

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[223] *See* text and notes at notes 58-68, 141-44 *supra*.

[224] *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

[225] 397 U.S. 254. (1970).

[226] The pre-termination fair hearing requirement was subsequently extended to driver's license suspensions, Bell v. Burson, 402 U.S. 535 (1971), to parole revocations, Morrissey v. Brewer, 408 U.S. 471 (1972), and to probation revocations, Gagnon v. Scarpelli, 411 U.S. 778 (1973), but not to discharge from government employment, Arnett v. Kennedy, 416 U.S. 134 (1974).

[227] Board of Regents v. Roth, 408 U.S. 564 (1972). Perry v. Sindermann, 408 U.S. 593 (1972).

[228] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[229] *See, e.g.*, Reich, *The New Property*, 73 Yale L.J. 733, 744 (1964). The distinction has

Furthermore, they involve situations where either the statute or the agency has spelled out eligibility requirements for the benefit with some precision or the plaintiff is already its possessor, so the claim of "entitlement" is not difficult for a court to pass upon. By contrast, where both statute and agency have left the bases for conferring the benefit utterly vague, the threshold showing of entitlement would seem impossible to make.[230] Ironically, therefore, the poorer the job an agency does in developing policy standards, the more minimal will be the procedural requirements it must satisfy.

But even more basic is the fact that the recent due process cases have been concerned with the need for a full evidentiary hearing. Although that is admittedly lacking in the banking decision process, it is not as yet the factor whose absence seems critical and whose presence is much to be desired. Judicialization of agency decision making is a remedy often prescribed, but its costs in terms of delay and expense frequently exceed by a wide margin its contribution towards improving the quality of decisions.[231]

At this stage, at any rate, the pressing need is for the articulation of policy rather than for trial-type hearings. The immediate problem is not one of resolving disputes about historical facts, but of specifying the purpose and bases of the exercise of controls over entry into banking markets. In terms of legal form, that can be achieved in one of two ways: by the adoption of policy statements and the exercise of the rulemaking power, or by a process of case-by-case adjudication and reasoned opinions. The route of policy

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not appealed to all courts. *Compare* Sumpter v. White Plains Housing Auth., 29 N.Y.2d 420, 328 N.Y.S.2d 649, 278 N.E.2d 892 (1972), *with* Davis v. Toledo Metro. Housing Auth., 311 F. Supp. 795 (N.D. Ohio 1970).

[230] To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

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Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[231] Possibly the small group of cases where an applicant or organizer is rejected or excluded on personal grounds constitutes an exception. The present procedure of disqualification on the basis of secret evidence might not withstand legal challenge: it can be argued that the person being branded as unacceptable is both stigmatized (at least within the agency and among the applicant group, and, given interchange of information among the banking agencies, on occasion with other agencies as well) and to some extent denied the liberty to enter a recognized occupation. At the same time, the reasons for secrecy do not involve lofty goals like protecting national security: in most of the sample cases, the adverse reports concerned a poor credit rating or financial position, and the source was treated as confidential simply to avoid embarrassment. Under these circumstances, due process probably entitles the barred applicant to an evidentiary hearing. *Cf.* Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Norlander v. Schleck, 345 F. Supp. 595 (D. Minn. 1972). Of course, as long as the final decision remains so totally discretionary, most such persons will be dissuaded by their colleagues from pursuing the matter and alienating the agency.

statements and rulemaking seems preferable, because it tends to force the decision maker to confront the more fundamental questions and think through and justify comprehensive answers;[232] that may explain its relative neglect. Alternatively, at least in theory, an agency can develop a consistent policy in piecemeal fashion, by separate adjudications—but the world will never know it unless opinions are written and published.

There is little that courts can do to force an agency to use its rulemaking authority,[233] but they are in a better position to require written explanations of decisions that are subject to judicial review, even in areas in which neither due process nor the Administrative Procedure Act[234] requires trial-type hearings. The very concept of limited review requires that the decision maker provide a reasoned justification for his action. As the Supreme Court said in *Chenery II*:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action. . . . In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'[235]

With a general decline in the level of automatic judicial deference to agency expertise has come a corresponding recent increase in the demand that agencies give reasoned explanations for their decisions, even when that is not required by the statute under which they are acting.[236] Most of these cases involve statutory review (where the statute under which the agency is acting has an explicit provision for court review) and that means that Congress intended for the agency to have to explain and defend its decisions in court.

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[232] *Cf.* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 526 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 937-40 (1965).

[233] *Compare* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764-65 (1969), *with* NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974).

[234] *See* 5 U.S.C. §§ 554, 556-57 (1970).

[235] SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947). *See also* Burlington Truck Lines v. United States, 371 U.S. 156, 167-69 (1962); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).

[236] *See, e.g.*, Natural Resources Defense Council v. EPA, 478 F.2d 875 (1st Cir. 1973); Air Line Pilots Ass'n v. CAB, 475 F.2d 900 (D.C. Cir. 1973); Wellford v. Ruckelshaus, 439 F.2d 598 (D.C. Cir. 1971); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

In cases of nonstatutory review (where the statute lacks an express judicial review provision and the plaintiff relies on the general jurisdiction of the federal courts in seeking an injunction or declaratory judgment), the courts have been more hesitant to intrude upon agency discretion, even by merely asking for explanation in any but a pro forma sense. But the same tendency is visible here,[237] and for the same reasons. Without explanation by the agency, as the banking cases previously discussed make clear, the court in affording judicial review is reduced to an unhappy choice between usurpation and futility.

There is no longer much room for dispute that charter and branch decisions are subject to judicial review, at the behest of either applicants or competitors.[238] Though an applicant may have no right to a charter or a branch, he has a right to have his application decided according to law by the agency, and the right to judicial review of that decision carries with it the necessity for explanation of its grounds.

The real issue is how little explanation will suffice. As satisfaction with the performance of administrative agencies has lessened, the level of understanding being required has risen, and remands for a more intelligible explanation have become a commonplace.[239] In nonstatutory review (which includes the bank licensing cases), however, the courts have been less assertive, or at least less explicit. *Overton Park*[240] demanded simply "an adequate explanation" by the Secretary of Transportation for his action, leaving it largely to the district court to decide whether the administrative record already provided one or had to be supplemented through formal, if belated, findings or actual testimony and cross examination. *Pitts*[241] did not change this position, though it did intimate that a "curt" explanation might be good enough.[242]

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[237] *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Citizens Ass'n v. Zoning Comm'n, 477 F.2d 402, 408-10 (D.C. Cir. 1973); District of Col. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

[238] *See* Camp v. Pitts, 411 U.S. 138 (1973).

[239] *See, e.g.*, Atchison T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 807-09 (1973); NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1321-26 (D.C. Cir. 1972); USV Pharmaceutical Corp. v. Secretary of HEW, 466 F.2d 455, 461-62 (D.C. Cir. 1972); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[240] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[241] Camp v. Pitts, 411 U.S. 138 (1973).

[242] The authority of that intimation is undermined by the fact that the case was decided on the certiorari papers without either full briefing or oral argument. The Court was in all likelihood unacquainted with the history of difficulties that had been encountered in reviewing the Comptroller's customarily "curt" explanations of decisions.

But however full or inadequate the explanation that the courts are prepared to demand, the requirements of good administration are an independent matter. Banking plays too central a role in our economic system, and the issues at stake in the administration of entry controls are too important, for a continuation of the present regime of unexamined and unexplained exercises of discretion. Whether they are ultimately forced to it by the courts or not, the banking agencies should articulate their policies and their reasons[243]—and not in the curt and superficial manner of *Pitts*.

The usual response to such a recommendation is that writing opinions in all cases would be a substantial burden on overworked staffs, and generally of little value since decisions depend on particular fact settings. There are answers on a number of levels. First and most fundamental, opinion writing is not the only or even the preferable way of establishing a clear policy; the route of policy statements and rulemaking, in terms of objective standards, would be more comprehensive and satisfactory.[244] It also makes more evident the gaps and inconsistencies in underlying premises and is therefore less likely to be adopted. On the charitable assumption that still more time and experience is necessary to work the problems through, perhaps a practice of case-by-case adjudication can still be rationalized. Second, the overworked staff objection is generally available against doing anything not already being done, but it has less application to the banking agencies than to most others. These agencies do not depend on Congressional appropriations for their funds, nor (with the exception of the FHLBB) on Congressional authorizations for their budgetary expenditures. If the job is worth doing, the staff can be increased. Third, the point about the limited value of most decisions does have merit. It has the most merit when policies are inchoate and standards are undefined, so that opinions consist of a list of the "relevant" factors in a particular case and a conclusion, with the connecting links left to the reader's imagination or the court's "opening-presumption of correctness." Still, if that is all the decision process has to offer, written opinions at least expose the vacuity to the view of courts and critics, instead of hiding it behind a protective veil of obscurity and trust in expertise.

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[243] The suggestion is not exactly a new one. *See* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES (1962).

[244] The validity of substantive informal rulemaking of this sort was recently considered at length and sustained, for the FTC, in National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). *See also* Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

Another line of objection to explanatory opinions is based on the fact that applications are sometimes, though not often, rejected on grounds that the agency believes would be substantially injurious to a bank or individual if made public. The existence of this possibility in a few cases is not an excuse for a general policy of non-explanation, and it ought not to be automatically invoked to shield all negative information. However, instances may remain where the agency believes it should not disclose certain information, in order to preserve (unwarranted) public confidence. If the information pertains to the applicant bank or group, the applicant could be afforded the option of withdrawing its request; if it pertains to an objecting bank, the ground could be expressly stated but in general terms, such as "to prevent an adverse impact on other institutions."[245]

It is submitted, therefore, that opinions in at least part of the cases should be regularly forthcoming. The following recommendations are designed to meet the need for a fuller explanation of the licensing decisions of the federal banking agencies, while taking into account distinctions between the various types of decisions and attempting to minimize the call on agency resources.

Recommendation 1. *General.* The federal banking agencies should undertake to provide a full statement of their objectives in approving or denying charter or membership applications and branches, and should define in concrete terms the standards to be applied. This can be done best by the adoption of policy statements and rules of general applicability, which should be as specific as possible. To provide additional clarity and understanding, reasoned opinions should be issued in certain situations as set forth below.

It should be noted that as policy statements and definitions of standards become more specific, it becomes less burdensome to decide and explain individual cases.

Recommendation 2. *Primary supervisor decisions: Comptroller and the Federal Home Loan Bank Board.* In the case of branch applications, the numbers are large and many approvals seem a matter of routine. Probably only a small minority of approvals, but a much larger fraction of denials, would occasion a desire or need for explanation. For branches, therefore, the Comptroller and the

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[245] If judicial review is sought, the court can, to the extent deemed warranted, afford *in camera* or protective order treatment to the supporting evidence.

FHLBB should furnish written opinions only when so requested by the applicant or by objectors, or when the agency believes the case presents issues of general importance. It would be appropriate to charge the requesting party an amount commensurate with the time cost of opinion preparation.[246]

Charter decisions are considerably fewer in number and, at present, more obscure in their grounds—in the Comptroller's case, even to his own staff, let alone applicants or protestants. An opinion should be furnished as a matter of course in all charter denials, since this is the most critical entry barrier, and in approvals when requested.

Recommendation 3. *Secondary supervisor decisions: Federal Reserve Board, Federal Deposit Insurance Corporation and Federal Savings and Loan Insurance Corporation.* Branch approvals by the FRB and FDIC seem well-nigh automatic, no doubt because of reliance on the primary approval of other authorities, and an opinion requirement in all cases would seem excessive. Rejections are something of an extraordinary event, however, and should always be accompanied by a full explanatory opinion.

Membership applications may not wholly fall into the same category, though only the FSLIC has a significant rejection ratio. It would probably be worthwhile to furnish written opinions on request, which would presumably be forthcoming mainly in the event of denial.

Recommendation 4. *Publication.* All four agencies should systematically collect and publish their licensing decisions and opinions in some convenient form. Depending on frequency and length, those of general importance might be included as part of monthly publications such as the *Federal Reserve Bulletin* or *Federal Home Loan Bank Board Journal*, or as an appendix to annual reports; others might be published as a separate series and made available in public files at the agency's Washington and field offices.[247]

As a concluding caveat, it must be recognized that opinions may be a necessary ingredient in the development and application of a coherent and well-defined policy of administration of entry controls, but they do not ensure such a policy. The opinions will be largely worthless if they consist of no more than a list of factors or a recital of facts, followed by a leap to the conclusion boilerplate without articulation of the connecting theories and standards and tradeoffs.[248] The decade of judicial decisions previously reviewed shows a growing disinclination on the part of courts to approve what they cannot follow, so long as they can view it as well intended and not corrupt. That tendency toward greater judicial rigor is to be applauded, but it is even more important that the agencies themselves move at last to discharge the policy making responsibilities inherent in the broad discretion conferred upon them by the Congress.

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[246] *See* 31 U.S.C. § 483a (1970); National Cable Television Ass'n v. United States, 415 U.S. 336 (1974).

[247] *Cf.* 5 U.S.C. § 552(a)(2) (1970), *as amended by* Pub. L. No. 93-502, 88 Stat. 1561.

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[248] Judge Jerome Frank paid his respects to such "woosh-woosh" opinions in Old Colony Bondholders v. New York, N.H. & H.R.R., 161 F.2d 413, 449-52 (2d Cir. 1947) (dissenting opinion).

COMPTROLLER OF THE CURRENCY
THE ADMINISTRATOR OF NATIONAL BANKS

SUMMARY OF INFORMATION TO BE SUBMITTED TO THE REGIONAL ADMINISTRATOR OF NATIONAL BANKS WITHIN 30 DAYS AFTER THE FILING OF AN APPLICATION TO ORGANIZE A NATIONAL BANK

(1) Population of city, town, county, village or municipality in which the proposed bank is to be located as of the last decennial census and a present estimate.

(2) (a) Estimated population of the service area, for last decennial census and a present estimate from which the proposed bank is expected to generate 75% or more of its loans and deposits.

(b) This area extends from the proposed bank location approximately
________ miles north; ________ miles east; ________ miles south;
________ miles west.
(Area must be outlined on the maps and aerial photographs submitted)

(3) Provide the following information with respect to each competitive bank and branches thereof located within the service area of the proposed bank (if complete branch figures are not available use consolidated figures). In nonpar, so indicate.

* Location marker number, names and addresses	Date established if within three years	Deposits	Loans
Distance by road mileage and direction from proposed bank	Interest rates paid on savings deposits and certificates of deposits	Interest rates normally received on short-term business and instalment loans	Rate of return on capital for previous three years
Hours of business	Estimate of commercial bank share of mortgage loan business	Loan-deposit ratio	

(4) Provide handy-sized duplicate maps (with a scale of miles and compass points) of the city or area appropriately labeled to show the location of the proposed bank and the names and locations of all banks and branches, including applications pending and those approved but not opened. Aerial photographs of reasonable coverage, including expected service area are helpful, and if available, one so labeled should be submitted. The expected service area of the proposed bank should be clearly outlined on the maps and on aerial photographs.

(5) Provide the following information with respect to Savings and Loan, Building and Loan, and Mutual Savings Banks located within the proposed service area.

Names and Addresses	Date established if within three years	Share Accounts	Loans	Distance by road mileage and direction from proposed bank

(6) Indicate the number of the following institutions within the proposed service area three years ago and the number of each at the present: Credit Unions, Finance companies, Insurance companies granting loans, and other institutions granting loans.

*Include applications pending and those approved but not opened.

Form CC 7022-18
Rev 3/71

(7) Indicate degree of intensity of competition in service area by Savings and Loan, Mutual Savings Banks, Credit Banks, etc.

(8) Provide a copy of any survey made preliminary to filing the application for the proposed bank and also the cost for any such survey.

(9) Comment on the economic character of the area to be served.

A. If area is largely residential, state whether homes are generally owner-occupied, the extent of housing development, type, quality, price level, average age, number of unsold new homes, and prospect for continued development.

B. If primarily industrial or business, state the number and general types of business, and in the cases of principal employers, give the name of each company or firm, number of employees, and payroll, and comment on the consistency of employment and special skills required.

C. Shopping center locations should be fully described. State the number of units, size as to total land and building area, number of individual parking spaces, accessibility to surrounding communities, the extent to which signed leases have been obtained, the names of principal lessees, and provide information as to their financial responsibility, if not national concerns.

D. Provide information regarding population growth potential; new businesses recently established or planned, etc. Discuss the traffic pattern, the street and road facilities, and their adequacy. Describe geographical barriers, if any.

(10) If no bank in community, where is banking business conducted by residents?

(11) Past banking history of community.

(12) Proposed ownership of stock, is it to be widely distributed or closely held. Amounts to be taken by organizers, proposed directors, officers and their families.

(13) Financial position of city, town, village, school districts and county. Discuss tax collections, showing total levy, percentage collected and arrears, etc.

(14) List the major types of loaning demands proposed bank expects to serve.

(15) Give estimates of the volume of total deposits, showing the amount of public funds included in total and total loans expected at the end of the first year of operations, second and third year.

(16) A detailed projection of earnings and expenses must be submitted showing the breakdown of income and expenses for each of the first three years of operations.

(17) Give the following information regarding banking house and equipment as it applies:

(a) If to be purchased, the separate costs of land, building, furniture and fixtures, and vault.

(b) If to be leased, give terms in brief and describe the quarters.

(c) If property is to be purchased or leased from a director, officer, or large shareholder, state name and other pertinent data.

(d) Give expiration date of any option to purchase or lease.

(e) If new construction, furnish anticipated completion date.

(f) If a temporary location is planned, furnish exact address, distance and direction from permanent location, and period it will be occupied.

(g) State the approximate period of time that will be required to place bank in operation in temporary and/or permanent site.

(18) What plans have been made to obtain fidelity insurance covering all individuals authorized to collect, receive or deposit funds from stock subscriptions?

REPORT IN SUPPORT OF RECOMMENDATION 75–2

AFFIRMATIVE ACTION IN FACULTY EMPLOYMENT UNDER EXECUTIVE ORDER 11246

*Jan Vetter**

INTRODUCTION

Many institutions of higher education hold federal contracts. As government contractors, they fall subject to Executive Order 11246, as amended.[1] The Order requires contractors to assure equal employment opportunity without regard to race, color, religion, sex or national origin in all the contractor's facilities, not just those involved in performance of a contract. In higher education, as elsewhere, administration of the Executive Order, or contract compliance, program has provoked a good deal of controversy. From within higher education there may be heard angry claims that the program seeks to override traditional standards of academic judgment and impose quotas of minority and women faculty.[2] This charge the Government denies. At the same time, persons interested in improving the position among higher education faculty of minority groups and women criticize the program as ineffective. There may be some truth in both these positions. Indeed, they are not necessarily inconsistent. For a number of reasons the program — at least in higher education, perhaps more generally — lacks clear direction. It may be turned to a number of purposes but exists in danger of losing any particular sense of purpose.

It may seem surprising to find the contract device employed as a reform measure. This use of the government contract, however, is by no means unprecedented. The United States Government is a formidable presence in the American economy. Each year it consumes a substantial fraction of the goods and services the country produces. As sovereign, the Government also makes and enforces laws advancing its conceptions of wise policy. These activities are sometimes connected — the Government uses its power as consumer to achieve its aims as regulator.[3] The antidiscrimination program carried out under Executive Order 11246 represents perhaps the most important contemporary example.

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[1] Exec. Order No. 11, 246, 3 C.F.R. 339 (1964–65 Comp.), amended by Exec. Order 11, 375, 3 C.F.R. 320 (1966–70 Comp.), 42 U.S.C. § 2000e (1970).

[2] See, *e.g.*, Seabury, *HEW and the Universities*, COMMENTARY, Feb., 1972, at 38; Shils, *Academic Appointment, University Autonomy and the Federal Government*, 9 MINERVA 161 (1971). For a critical view of the literature critical of the HEW program in higher education see Ezorsky, *The Fight Over University Women*, NEW YORK REVIEW OF BOOKS, May 16, 1974, at 32.

The Order obliges employers contracting with the Government to promise *nondiscrimination* on grounds of race, color, religion, sex or national origin and *affirmative action* to assure equal employment opportunity. If the Government finds that a contractor has breached these obligations, it may terminate existing contracts and declare him ineligible for future contracts, to mention only the more draconian remedies. In the degree to which an employer depends upon government contracts, it may seem, he will try to perform his commitments to nondiscrimination and affirmative action. Given the Government's wide reach in the marketplace, the argument follows, execution of this strategy should contribute in a major way toward curing discrimination in employment.

Except for a short period around the close of the Second World War, executive orders attacking employment discrimination have been in effect since 1940.[4] Up to the current order at least, they were not conspicuously successful. It is true that one investigator, discovering the existence of the then effective order in 1957, announced the end of discrimination.[5] A successor, observing a flurry of activity carried out under a later order in the early 1960's, expressed optimism that the program might prove effective.[6] In retrospect, both statements seem unguarded. Progress clearly depended upon a much more substantial investment than had been committed. In 1965 the present order was promulgated, and the program entered a period of reorganization and expansion. The Labor Department has been given responsibility for administration of the program. The Secretary, pursuant to a delegation contained in Executive Order 11246, has issued a series of detailed regulations. Within the Department, the Office of Federal Contract Compliance implements the Order and regulations. This includes oversight of the work of other agencies designated by the Secretary of Labor as compliance agencies. For higher education, the compliance agency is the Department of Health, Education and Welfare and, within the Department, the Office of

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[3] See Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 Va. L. Rev. 27 (1955).

[4] The principal orders applying antidiscrimination regulation to government contractors are the following: Exec. Order No. 8802, 3 C.F.R. 957 (1938–43 Comp.); Exec. Order No. 9001, 3 C.F.R. 1054 (1938–43 Comp.); Exec. Order No. 9346, 3 C.F.R. 1280 (1938–43 Comp.); Exec. Order No. 10, 210, 3 C.F.R. 390 (1949–53 Comp.); Exec. Order No. 10, 227, 3 C.F.R. 739 (1949–53 Comp.); Exec. Order No. 10, 231, 3 C.F.R. 741 (1949–53 Comp.); Exec. Order No. 10, 243, 3 C.F.R. 752 (1949–53 Comp.); Exec. Order No. 10, 281, 3 C.F.R. 781 (1949–53 Comp.); Exec. Order No. 10, 298, 3 C.F.R. 828 (1949–53 Comp.); Exec. Order No. 10, 308, 3 C.F.R. 837 (1949–53 Comp.); Exec. Order No. 10, 479, 3 C.F.R. 961 (1949–53 Comp.); Exec. Order No. 10, 557, 3 C.F.R. 218 (1954–58 Comp.); Exec. Order No. 10, 925, 3 C.F.R. 443 (1959–63 Comp.); 5 U.S.C. § 3301 (1970); Exec. Order No. 11, 246, 3 C.F.R. 339 (1964–65 Comp.), 42 U.S.C. § 2000e (1970); Exec. Order No. 11, 375, 3 C.F.R. 320 (1966–70 Comp.), 42 U.S.C. § 2000e (1970).

[5] Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 Va. L. Rev. 837 (1957) ("It can fairly be said that discrimination by government contractors is now the exception rather than the rule.")

[6] SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT, ch. 5 (1966).

Civil Rights (OCR). HEW's Office of Civil Rights in Washington supervises branches in ten regional offices of HEW around the country. It is the activity of OCR and the regional offices which has proved so controversial, stirring a great, but stationary, cloud of dust.

A number of the factors which account for this situation are readily identified. OCR has only a small number of people to deal with a large number of institutions. No one seems to know how many institutions of higher education hold federal contracts, but of a total of approximately 2300 such institutions, one estimate places the number of contractors at 1100. It seems that many institutions have had little or no contact with the program. A great deal of time has been spent in more or less inconclusive battle between OCR and a handful of universities.

The Government employees who work in the program are poorly trained and seem to have little knowledge or understanding of higher education. Consequently, much time and effort are expended on the job in discovering the intricacies of university organization and academic personnel practices. Compliance review teams gather a great deal of data, but it is not always clear that what is obtained is understood.

The Labor Department's regulations are overgeneralized. The construction industry is treated separately, but otherwise all contractors are lumped together under the same regulations. These regulations clearly have in view a model of industrial employment. They fit the conditions of faculty employment very poorly indeed. Such matters as faculty participation in the management of universities, advanced work in intellectual disciplines and the unique combination of functions manifested in the professorial role find no reflection in the regulations.

The sanctions the Government has at its disposal are clumsy and overpotent. Although OCR has requested government agencies not to contract with certain institutions for brief periods of time, it has never moved seriously to debar a university. In order to cut off a contractor, the Government must deny itself the contractor's services, and this the Government may be unwilling to do. Then too, OCR fears the impact such a step would have on the institutions. The university, of course, shares the same sentiment and moves some way to meet OCR's demands. In consequence, the parties negotiate toward a settlement, and such outcomes as are achieved reflect less the standards of the regulations than they do the chances of a bargaining process.

More fundamental than any of these difficulties, in part their cause, is the ambiguous and contradictory character of the regulations themselves, at least in relation to higher education. It is clear neither to OCR nor to institutions of higher education what it is that the regulations require. This helps account for such features of the program as poor administration, inefficiency, improvised solutions and prolonged negotiation.

Although the problems of administering the Executive Order in higher education are serious enough, the program has begun to encounter an additional set of problems created by a variety of antidiscrimination statutes which overlap the Executive Order. There have now come to exist many opportunities for duplicated effort, conflicting results, inconsistent standards and administrative confusion. This makes urgent a more sustained and fruitful effort at coordinating the many arms of federal antidiscrimination regulation than has taken place thus far.

THE EXECUTIVE ORDER PROGRAM — ADMINISTRATION IN HIGHER EDUCATION

Executive Order 11246 is the source of the contract compliance program. It requires that nonexempt [1] government contracts include a so-called equal employment opportunity clause, providing as follows:

> During the performance of this contract, the contractor agrees as follows:
>
> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.
>
> (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.
>
> (3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
>
> (4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

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[1] Section 204 of Exec. Order No. 11246 provides:

> The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: And *provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

> (5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
>
> (6) In the event of the contractor's non-compliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
>
> (7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.[2]

The Order places the Secretary of Labor in charge of the contract compliance program and gives him authority to adopt rules and regulations and issue orders, to require compliance reports from contractors and subcontractors and to provide for hearings for compliance, enforcement or educational purposes.[3] A series of "sanctions and penalties" are specified, including: (1) publication of the names of noncomplying contractors, (2) recommendation to the Justice Department for suit to enforce the provisions of the Order, (3) recommendation to the Justice Department or the Equal Employment Opportunity Commission for institution of proceedings under Title VII of the Civil Rights Act of 1964, (4) recommendation to the Justice Department for criminal proceedings for furnishing false information to the Secretary of Labor or a contracting agency, (5) cancellation, termination or suspension of contracts or portions of contracts for non-compliance, (6) debarment of contractors as eligible bidders on government contracts.[4] (Of this list of possible sanctions, the ones of practical significance in the administration of the program have been those providing for termination and cancellation of contracts and debarment.) Government contractors are divided into two classes — construction and nonconstruction. Institutions of higher education fall in the latter category, and it is the program for nonconstruction contractors that is of concern here.[5] The Order allows the Secretary of Labor to delegate his functions or duties "except authority to promulgate rules and regulations of a general nature." [6] The Secretary has designated the Department of Health, Education and Welfare as the compliance agency for a number of industries including medical, legal and education services. HEW, therefore, administers the contract compliance program in higher education pursuant to regulations promulgated by the Secretary of Labor.

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[2] Exec. Order No. 11, 246 § 202. See also 41 C.F.R. § 60-1.4 (1973).

[3] Exec. Order No. 11, 246 §§ 201, 203, 208.

[4] *Id.* § 209.

The Labor Department has issued a set of regulations (which seem always to be in the process of revision) controlling administration of the program. These are found in 41 CFR Chapter 60 and include: "Obligations of contractors and subcontractors" (41 CFR 60–1), "Affirmative action programs" (41 CFR 60–2), "Employee testing and other selection procedures" (41 CFR 60–3), "Sex discrimination guidelines" (41 CFR 60–20), "Hearing rules for sanction proceedings" (41 CFR 60–30), "Examination and copying of OFCC documents" (41 CFR 60–40), "Guidelines on discrimination because of religion or national origin" (41 CFR 60–50) and "Contractor evaluation procedures for contractors for supplies and services" (41 CFR 60–60). The more important of these in the administration of the program are "Obligations of contractors and subcontractors," "Affirmative action programs," "Employee testing and other selection procedures," "Sex discrimination guidelines" and "Contractor evaluation procedures for nonconstruction contractors." [7]

Much of the regulation on "Obligations of contractors and subcontractors" repeats the provisions of the Executive Order and outlines its requirements at a greater level of detail. Exemptions from the Order are specified.[8] Compliance agencies are instructed to develop programs for administration of the Order.[9] Contractors are required to furnish compliance reports annually and to supply with bids information relevant to a determination of compliance status.[10] Segregated facilities are prohibited.[11] Compliance reviews, consisting of "comprehensive analysis and evaluation" of employment practices as they bear on contractors' obligations for nondiscrimination and affirmative action, are established as a basic tool of the program. The regulation further provides that no contract of $1,000,000 or more is to be awarded unless satisfactory compliance has been determined through a pre-award review or a compliance review conducted within the preceding twelve months.[12] Procedures for processing complaints are set up,[13] and a system of hearings for cancellation, termination and debarment is established.[14] Contractors are instructed to permit access to their records for purposes of investigation.[15] Most significantly, contractors (and subcontractors) with fifty or more employees and a contract of $50,000 or more are required to develop written affirmative action programs.[16]

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[5] Part II of Exec. Order No. 11, 246 deals with nonconstruction contractors, Part III with federally assisted construction contracts.

[6] *Id.* § 401.

[7] The "Guidelines on discrimination because of religion or national origin" stand in some contrast to the regulations dealing with race and sex discrimination. Contractors are instructed to review their employment practices "to determine whether members of the various religious and/or ethnic groups are receiving fair consideration for job opportunities." If the review shows deficiencies, a contractor is to undertake "outreach and positive recruitment activities." Religious and ethnic discrimination is made subject to the OFCC compliance review and complaint procedure. However, it is made clear that "the scope of the employer's efforts shall depend upon all the circumstances, including the nature and extent of the employer's deficiencies and the employer's size and resources." Contractors need not establish affirmative action plans, with their sub-structure of utilization analyses and goals and timetables, to deal with religious and ethnic discrimination. The elaborate criteria applied to employer selection procedures need not be satisfied. The Guidelines provide that contractors must take reasonable steps to accommodate employees' religious practices if they can do so without "undue hardship." The question of hardship entails consideration of "(a) business necessity, (b) financial costs and expenses, and (c) resulting personnel problems." This seems a good deal more indulgent than various provisions of the Sex Discrimination Guidelines.

[8] Section 60–1.5, 41 C.F.R. ch. 60 specified certain exemptions, including, *inter alia*, contracts not exceeding $10,000 and contracts to be performed outside the United States by employees not recruited domestically.

[9] *Id.* at § 60–1.6.

[10] *Id.* at § 60–1.7.

The regulation on "Affirmative action programs" — Revised Order No. 4 — is in many ways the heart of the contract compliance program. According to Order 4, "an affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort." [17] Such a program rests on two devices: utilization analyses and goals and timetables. The first of these entails an obligation of the contractor to determine if minority group members or women are encountered less frequently at various levels and in various areas of his operations than would be expected in view of their availability ("underutilization"). In the event that analysis discloses underutilization, or a "deficiency," the contractor must establish "goals and timetables" — predictions of increased utilization, to be achieved by good faith effort, according to a prescribed time scale to the point at which the deficiency is eliminated.[18] Persons who are discovered to be suffering from the effects of past discrimination make up an "affected class," and "corrective action" measures must be instituted to establish compliance.[19] An affirmative action program must in addition include a number of elements the regulations summarize as follows:

> (a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions;
>
> (b) Formal internal and external dissemination of the contractor's policy;
>
> (c) Establishment of responsibilities for implementation of the contractor's affirmative action program;
>
> (d) Identification of problem areas (deficiencies) by organizational units and job classification;

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[11] *Id.* at § 60–1.8.

[12] *Id.* at § 60–1.20.

[13] *Id.* at §§ 60–1.21–1.24.

[14] *Id.* at § 60–1.26.

[15] *Id.* at § 60–1.43.

[16] *Id.* at § 60–1.40.

[17] 41 C.F.R. § 60–2.10.

[18] *Id.* at §§ 60–2.11, 60–2.12.

[19] *Id.* at § 60.2.1.

> (e) Establishment of goals and objectives by organizational units and job classification, including timetables for completion;
>
> (f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives;
>
> (g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program;
>
> (h) Compliance of personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60–20);
>
> (i) Active support of local and national community action programs, designed to improve the employment opportunities of minorities and women;
>
> (j) Consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures.[20]

Many actions a contractor must take in conducting a utilization analysis, in establishing goals and timetables and in satisfying the other requirement of an affirmative action program are stipulated in the regulation. In sum, affirmative action demands attempts to seek out eligible minority and female candidates, efforts — as by way of training and provision of child care — to redress disadvantages from which minorities and women are thought to suffer and continuous, systematic and detailed oversight of personnel policies and practices to eliminate discrimination and guard against inadvertent or unconscious bias.

The regulation on "Employee testing and other selection procedures," though prinicipally directed at formal testing programs, covers all methods of "hire, transfer, promotion, training or retention." "Test" is defined as "any paper-and-pencil or performance measure used as a basis for any employment decision" as well as "all other formal, scored, quantified or standardized techniques of assessing job suitability including, for example, personal history and background requirements which are specifically used as a basis for qualifying or disqualifying applicants or employees, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales and scored application forms."[21] Contractors using tests are required to develop evidence of the test's validity — that is, demonstration of a relationship between test performance and job behavior. Minimum standards for validation are prescribed,[22] and separate demonstrations of validity for minority groups and women are demanded where "technically feasible." [23] If tests of substantially equal validity are available, contractors are expected to use the test "which will have the least adverse effect on the employment opportunities of minorities or women." [24] Contractors are not required to use "tests," but where there is evidence suggesting that techniques other than tests have had the effect of discriminating

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[20] *Id.* at § 60–2.13, as amended July 8, 1974, 39 Fed. Reg. 25654. (1974).

[21] 41 C.F.R. § 60–3.2.

[22] *Id.* at § 60–3.5.

[23] *Id.* at § 60–3.5(b)(5).

[24] *Id.* at § 60–3.14.

— *e.g.*, underutilization is found, evidence of validity may be required. If the contractor is "unable or unwilling to perform such validation studies," then "he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination." [25]

The "Sex discrimination guidelines" are currently shifting in content, the text of a proposed revision having appeared in the Federal Register at the end of December, 1973. The principal changes under consideration relate to "corrective action," insurance and pension and retirement plans and maternity benefits. Otherwise, both versions cover much the same ground. Thus, contractors must recruit among both sexes for all jobs, may not advertise in "Male" and "Female" columns, must provide equivalent facilities and services for both sexes and may not address requests for information — *e.g.*, marital status — to applicants of one sex only.[26] Employees of both sexes must enjoy equal opportunity to qualify for any job.[27] No sex-based distinction may be drawn in "employment opportunities, wages, hours, or other conditions of employment," [27a] sex-linked seniority lines, different retirement ages for men and women, discrimination in compensation and anti-nepotism rules which bear unequally on one sex are explicitly prohibited.[28] A contractor may not justify sex discrimination by reliance on state protective legislation — *e.g.*, a law limiting the weight women may be required to lift.[29] The proposed changes on insurance, pension and retirement plans and maternity benefits are discussed below. The subject of corrective action, introduced in the proposed guidelines for the first time, has to do with the problem of relieving the effects of past discrimination.[30] For example, the effects of historic sex segregation of jobs may persist after company policy is changed to permit transfer between jobs. This will likely occur when seniority for purposes of layoff dates from entry into a job, line of progression or department because women formerly locked into their positions by segregation may be reluctant to give up their accrued seniority upon transfer. The proposed regulation requires protection against consequences of this kind. In the example given, this might mean a shift to company-wide seniority for the affected women or an award of seniority credit to transferring women back to the date on which it may be calculated they would have made the transfer in the absence of segregation.

"Contractor evaluation procedures for contractors for supplies and services" — also known as Revised Order No. 14 — lays down procedures for compliance reviews. As amended in February, 1974, this regulation describes a three-step review procedure consisting of (1) a desk audit, (2) an on-site review and (3) an off-site analysis of "information supplied by the contractor during or pursuant to the on-site review." [31] A desk audit is a review of a contractor's written affirmative action program and "workforce analysis," [32] to be furnished upon request of the compliance agency. Normally,[33] an on-site review will be scheduled following the desk audit except in two classes of cases: (1) where the desk audit discloses the contractor's failure to make a reasonable effort to meet his obligations, in which case enforcement proceedings should be commenced, and (2) where an on-site review has been conducted within the previous twenty-four months, the desk audit confirms that the contractor has a satisfactory program and the circumstances of the previous audit have not substantially changed.[34] An on-site review, which is to include employee interviews,[35] encompasses "(1) information necessary to conduct an in depth analysis of apparent deficiencies in the contractor's utilization of women or minorities, (2) information required for a complete and thorough understanding of data contained in or offered in support for the affirmative action program and (3) information concerning matters relevant to a determination of compliance with the requirements of Executive Order 11246 (as amended) but not adequately addressed in the affirmative action program." [36] Finally, an off-site analysis of material obtained during the on-site review is to be conducted "where issues have arisen concerning deficiencies or an apparent violation which, in the judgment of the compliance officer, should be more thoroughly analyzed off-site before a determination of compliance is made." [37] The regulation attempts to provide a good deal of protection against public disclosure of data furnished by contractors.[38] Information a compliance agency obtains from a contractor is ordinarily available for public inspection and copying under the Freedom of Information Act.[39] This extends to affirmative action plans, conciliation agreements and validation studies of tests.[40] However, a contractor may claim that certain data is not subject to disclosure and obtain a determination of the question from the compliance agency, with a right of appeal to the Director of OFCC.[41] Material taken off-site for analysis and much information held by a compliance agency during a compliance review or an enforcement proceeding is considered part of an investigatory file compiled for law enforcement purposes and therefore exempt from disclosure under the Act for the duration of the review.[42] Certain data, such as trade secrets, confidential commercial or financial data, the names of complainants and personnel and medical files are regarded as not subject to disclosure.[43] A compliance review is to be concluded with an exit conference in which the compliance officer summarizes for the contractor the findings of the review. At that time or after further analysis the agency is to seek a written conciliation agreement committing the contractor to correct deficiencies revealed by the review.[44] The entire process is to be completed expeditiously. Enforcement procedures "shall be applicable" if a contractor fails to supply an affirmative action program and supporting documents, including a workforce analysis, within thirty days.[45] Within sixty days of receipt of the necessary documents the compliance agency is to have notified the contractor that he is in compliance or have issued a thirty-days show cause notice (subject to extensions of time for good cause).[46]

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[25] *Id.* at § 60–3.13.

[26] 41 C.F.R. §§ 60–20.2(a)–(c), 60–20.3(f).

[27] *Id.* at § 60–20.3(b). An exception is made for jobs for which sex is a bona fide occupational qualification.

[27a] *Id.* at § 60–20.3(c).

[28] *Id.* at §§ 60–20.4, 60–20.3(i), 60–20.5(a), 60–20.3(j).

[29] *Id.* at § 60–20.3(g). See also *id.* at § 60–20.6, providing that inconsistent state law is preempted.

[30] *Id.* at § 60–20.2(e).

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[31] 41 C.F.R. § 60–60.3.

[32] "'Workforce analysis" is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job groups) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed." *Id.* at § 60-2.11(a), 39 Fed. Reg. 25654-55 (1974); 41 C.F.R. § 60-2.11(a), 39 Fed. Reg. 25654 (1974).

[33] See "Exceptions to the desk audit requirements," Id. at § 60–60.3(a).

[34] *Id.* at § 60–60.3(b).

[35] *Id.* at § 60–60.5.

[36] *Id.* at § 60–60.3(b)(1).

[37] *Id.* at § 60–60.3(c).

[38] See *id.* at Subpart C — "Disclosure and Review of Contractor Data" — and § 60–60.3(b)(1), limiting requests for information during on-site reviews to ". . . the specific items of information which the compliance officer determines are: (i) Necessary for conducting the review and completing the standard compliance review report, and (ii) Nor contained in or able to be derived from the material submitted by the contractor." See also § 60–60.3(a) — "Exceptions to the desk audit requirements" and § 60–60.3(b)(2).

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[39] *Id.* at § 60–60.4(d); 41 C.F.R. 60–40.

[40] 41 C.F.R. § 60–40.2.

[41] 41 C.F.R. § 60–60.4(d).

[42] 41 C.F.R. § 60–40.3(5); 41 C.F.R. §§ 60–60.4(c), (d).

[43] 41 C.F.R. § 60–40.3. It seems apparent that the Labor Department undertook this latest revision of Order No. 14 in order to secure by administrative revision rather than attempt by appeal reversal of the decision in *Alameda County Legal Aid Society v. Schultz*, 349 F. Supp. 771 (N.D. Cal. 1972), holding that the Freedom of Information Act (5 U.S.C. § 552) required disclosure of a great deal of material furnished the Government by contractors. Under the new version of Order No. 14 it may be argued that much information revealed to government agents in the course of compliance reviews escapes the Freedom of Information Act because it never comes into the Government's possession (material made available only during an on-site review) or makes up part of an investigatory file compiled for law enforcement purposes. Comments furnished the Labor Department following publication of the revision show that both contractors and antidiscrimination groups saw the issue of public disclosure as by far the most significant aspect of the revision. Given the expansion in the legal concept of discrimination and the consequent narrowing of the gap between "underutilization" under the Executive Order and "discrimination" under Title VII of the Civil Rights Act of 1964, contractors have reason to fear that publicly disclosed data compiled for compliance review purposes will be used as evidence against them in Title VII cases and that plaintiff representatives may use such data to select defendants. These considerations operate with particular force where "affected class" situations are involved. Moreover, publicity itself can be used as a sanction. Plaintiff representatives might be expected to favor maximum disclosure for the same reasons contractors would resist it. Such material may also be helpful in litigation aimed at compelling compliance agencies to enforce the regulations because it may show that agencies are not in fact enforcing the regulations as written. Since academic personnel systems are often thought to depend upon confidential written evaluations of professors by colleagues and scholars in the same field, the question of disclosure has been a particularly sensitive one in HEW's higher education program. Revised Order No. 14 probably effects a satisfactory compromise from the point of view of most institutions of higher education; it is unlikely to please groups interested in employing the Order to advance minority and women faculty.

[44] 41 C.F.R. § 60.60.6.

[45] *Id.* at § 60.60.2.

[46] *Id.* at § 60.60.7, as amended July 8, 1974, 39 Fed. Reg. 25655 (1974).

THE OFFICE FOR CIVIL RIGHTS

Within HEW, the compliance agency for education, the agency responsible for performing the department's contract compliance functions is the Office for Civil Rights. Within OCR, the Higher Education Division has charge of the program for institutions of higher education. The Division's activities are conducted by a headquarters staff in Washington, D.C., and branch office personnel in ten regional offices. The location of the regional offices, the number of employees assigned to the executive order program in higher education as of June 30, 1973, and the number projected for June 30, 1974, are shown below:

		6/30/73	6/30/74
Headquarters	Washington, D.C.	19	19
Region:			
I	Boston	7	10
II	New York City	13	14
III	Philadelphia	6	10
IV	Atlanta	14	13
V	Chicago	10	13
VI	Dallas	10	12
VII	Kansas City	—	8
VIII	Denver	4	9
IX	San Francisco	13	13
X	Seattle	4	6
		100	127

There are an additional 48 employees projected for June 30, 1974, who will have responsibility for Titles VI and IX of the Civil Rights Act of 1964 (Title IX having been added by the Equal Educational Opportunity Act of 1972).

OCR's activities under the Executive Order might be divided into three categories: (1) performance of compliance reviews, (2) investigation of complaints and (3) furnishing technical assistance to higher education institutions. OCR's statistical record of its activities in higher education is not all one might wish, but the following data, supplied by OCR, gives some idea of the scale of its operations. In the period November 16, 1971, to December 31, 1972, OCR processed higher education affirmative action plans as indicated:

Regions	I	II	III	IV	V	VI	VII	VIII	IX	X	Total
AAPs approved interim or final	1	1	1	0	0	11	0	8	7	1	30
AAPs rejected	0	13	0	6	0	5	11	5	8	3	51
AAPs pending	15	17	3	6	24	9	0	21	17	4	116

During the period January 1 to July 23, 1973, sixty-two affirmative action plans were received, of which three were given final approval. The rest remained pending; none were rejected. Five plans were requested but not received. Since July 23, 1973, only a very few plans have been approved. Statistics on the number of plans approved fail to reflect the actual condition of the program. During the period in which there had been sustained compliance activity in higher education standards for approval of affirmative action programs have grown more stringent. Consequently, many plans previously approved, including plans adopted by some leading universities, do not meet OCR's current conception of the requirements of Order No. 4. The Director of the Higher Education Division has estimated that the number of approved plans which do meet this standard is probably nine (excluding junior colleges) and in any case not more than nineteen (as of April, 1974).

Statistics on the handling of complaints are, if anything, even more fragmentary. According to figures supplied by OCR, the agency received 544 complaints between November 16, 1971, and December 31, 1972. (These include both academic and non-academic staff.) Of these, 355 claimed sex discrimination and 189 charged discrimination on grounds of race and national origin. Two hundred twenty-five complaints were "settled or closed," seventy-six were under investigation, 107 had not been reached for investigation and 137 had been transferred to the Equal Employment Opportunity Commission. (EEOC acquired jurisdiction over higher education in March, 1972, and complaints filed with OCR after that date were transferred to EEOC. So-called "class complaints" — complaints filed on behalf of an individual and other persons similarly situated — of which eighty-eight were pending on December 31, 1972, were divided into class and individual aspects after EEOC's entry into the field, with the former component of the complaint being retained by OCR and the latter referred to EEOC. OCR currently has this arrangement under review.) The disposition of complaints carried as "settled or closed" is not clear. Many appear to have been dismissed as lacking in merit; in at least a few cases the agency obtained backpay settlements or reinstatement. Currently, OCR has 303 Executive Order complaints pending, of which 180 are class complaints and 123 individual complaints. These cases date back in some instances to 1969. (OCR is also processing at the present time some 62 complaints under Title VI and Title IX.) By the end of March, 1974, OCR had completed seventy-three letters of findings on individual and class complaints during the current fiscal year.

OCR employees spend some part of their time responding to inquiries and requests for assistance from institutions. Thus, in this fiscal year OCR anticipates furnishing guidance to about 178 institutions. In October, 1972, OCR issued its "Higher Education Guidelines," giving an interpretation of the OFCC regulations in the higher education context.

Over a long period of time OCR has been attempting to prepare a technical assistance package supplying information bearing on the availability for academic positions of minority group members and women and discussing methods of calculating availability for purposes of determining underutilization and setting goals and timetables.

It seems generally agreed, within and without OCR, that administration of the higher education program in its first years suffered from a number of defects. As the figures given above suggest, the agency has had difficulty in achieving satisfactory and prompt resolution of complaints. It also appears that in some cases complaints were lost or files mislaid (hence, agency statistics on complaints are not entirely reliable). Nevertheless, a great deal of time has gone into this activity; according to estimates supplied by the branch officers to the Washington office of the Higher Education Division in January, 1973, individual complaints required an average of 27.2 man days per complaint. Also revealing is the variation reported among the branches; the estimates of man days required per complaint ranged from ten to fifty man days, suggesting that the regions held contrasting views on what constitutes a proper investigation.[47] The compliance review process seems also to have been more burdensome to institutions than it was effective in securing compliance. Thus, many reviews have been conducted but only a relatively few plans have won approval and, of these, only a small handful are currently regarded as actually satisfactory. Meanwhile, institutions have supplied a great deal of data, and in some areas have been put to much trouble and expense, without any clear resolution of their compliance status having been achieved. Branch office representatives have not always appeared capable of analyzing properly the information they have received, and seem also to have lacked a common understanding of the compliance review process and of the standards to be applied to affirmative action programs. Complaints of universities on this last point seem to receive some confirmation from the information given in the table below, showing action on affirmative action programs by region for the period November 16, 1971, through November 31, 1972, and the regions' estimates, given in January, 1973, of man days required for a compliance review.

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[47] According to information supplied by OCR the regional offices made the following estimates of mandays required per complaint:

I	30	VI	15
II	50	VII	50
III	—	VIII	15
IV	10	IX	30
V	30	X	15

	AAPs approved interim or final	AAPs rejected	AAPs pending	AAP desk audits man days	AAP field review man days
I	1	0	15	30	110
II	1	13	17	8	50
III	1	0	3	—	—
IV	0	6	6	5	40
V	0	0	24	15	30
VI	11	5	9	10	15
VII	0	11	0	10	27
VIII	8	5	21	10	40
IX	7	8	17	20	20
X	1	3	4	15	60

Thus, Regions II and VII collectively rejected twenty-four plans and approved only one while Regions VI, VIII and IX approved twenty-six plans and rejected eighteen. The region approving the highest number of plans (VI) required the least time to perform a compliance review — twenty-five man days, while the regions with the most adverse ratio of rejected to approved plans (II, VII) required fifty-eight and thirty-seven days, respectively, to complete a review.

At least some of the problems encountered in the administration of the program appear to be in the process of solution owing to the leadership provided by the current director of the Higher Education Division. Thus, the Division appears to be compiling more detailed and informative records, gaining more sensitivity to the unique characteristics of higher education and providing the branch offices more guidance and supervision and the compliance program as a whole may show a firmer sense of management. Certain difficulties remain, however.

The Division staff lacks experience with higher education. OCR has claimed fourteen employees have been connected with institutions of higher education in faculty, consultative and administrative positions, but there is good reason to believe that this number, though small, is inflated. There is one Ph.D. on the Division staff (the Director) and a small number of employees with Master's or law degrees. As of March 1, 1974, thirty-five positions were vacant owing to difficulty in recruiting persons with experience in higher education. Training within OCR has been limited. A three and one-half day seminar was given in Fall, 1972 and a three day seminar (for OCR personnel generally) in Winter, 1972 and Spring, 1973. A program concerned with affirmative action standards was given for senior branch office employees from August 20 to 24, 1973. New employees since February, 1973, are supposed to undergo a three month training and orientation program under the regional office branch chiefs. This includes "introductions, briefings, and seminars with local college administrators and equal opportunity officials, women's campus groups, officials in related Federal programs (e.g., OE, EEOC, and

OFCC), etc.," together with "an overall orientation of compliance programs administrated by the Office for Civil Rights." [48]

The Division's jurisdiction is vast and ill-defined. There are about 2,400 institutions of higher education in the United States, employing slightly over 250,000 full-time faculty members (and, of course, many more part-time faculty, nonteaching academic employees and nonacademic staff). How many of these institutions are federal contractors is unknown, but one estimate, from the Higher Education Division, places it at about 1,100. How much federal money reaches these institutions through government contracts also appears to be unknown although, for some institutions government contracts undoubtedly provide an important source of funding. The total amount and its distribution, whatever they may be, would considerably understate OCR's purchase on higher education. At least with respect to sex discrimination in employment, Title IX, forbidding sex discrimination in federally assisted educational programs and activities, provides an additional instrument of regulation. HEW also holds the view, a debatable one, that Title VI of the 1964 Civil Rights Act, which prohibits discrimination on grounds of race, color or national origin in programs receiving federal financial assistance, may apply to employment practices.[49] However, the Executive Order and Title VI and Title IX provide different criteria of administration (discussed below), so that these programs cannot easily be treated as a single integrated program. Passage of Title IX, together with HEW's interpretation of Title VI, both enlarge and complicate OCR's mandate in higher education. From the perspective of individual institutions, OCR must seem to resemble Gulliver in Lilliput, but OCR must feel that the more appropriate analogy is to Gulliver in Brobdignag. The agency lacks the staff and resources to fulfill its charter; it has failed to keep its complaint docket current, and it cannot perform compliance reviews in anything approaching the number or frequency OFCC regulations require. Many contracts of $1,000,000 or more have been awarded without a pre-award review, and it seems safe to say that a large number of higher education contractors have never been through a compliance review.

OFCC regulations rather impede than facilitate the administration of a compliance program in higher education. The very problematic application of these regulations receives extensive discussion below. Here, it may be sufficient to give one example of their lack of fit to higher education. Order No. 14 directs completion of compliance reviews in ninety days, from the compliance agency's request to the contractor for his affirmative action program to the agency determination of compliance status. OCR regards this schedule as hopelessly unrealistic, and it is clearly true that its reviews have regularly consumed a great deal more time than ninety days. The affirmative action program of Harvard University, approved in November, 1973, was reportedly the product of two years of negotiations, for example. At the same time that OCR administers an inappropriate set of regulations it also must coordinate the contract compliance program with other programs and other agencies. For some time, the Executive Order was the only federal regulation directed at employment discrimination in higher education (with the possible exception of Title VI of the 1964 Civil Rights Act, which seems to have had little or no practical significance for employment practices in higher education). The Order has now been joined by Titles VII and IX of the Civil Rights Act of 1964 and the Equal Pay Act, and OCR finds itself in uneasy alliance with the Wage and Hour Administration and EEOC. Whether or not there are too many cooks is not yet clear, but there are plainly enough to get in one another's way.

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[48] Letter from Gwendolyn H. Gregory, Director, Office of Policy Communication, Office for Civil Rights, HEW, to Sheldon E. Steinbach, American Council on Education, dated September 17, 1973.

[49] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, seems not to apply to employment practices "except where a primary objective of the Federal financial assistance is to provide employment." *Id.* at § 604, 42 U.S.C. §2000d–4. However, HEW takes the position that where employment discrimination produces effects prohibited by Title VI employment practices come within the statute. See 45 C.F.R. § 80.3(c)(3).

FEDERAL ANTIDISCRIMINATION REGULATION OF HIGHER EDUCATION

For a number of years the Executive Order was the only federal regulation of any significance covering discrimination among higher education faculty (and the Order, of course, applied only to institutions with government contracts). Title VII of the Civil Rights Act of 1964 did not extend to institutions of higher education or to agencies of state and local government.[1] HEW has interpreted the Title VI (of the 1964 Civil Rights Act) prohibition on racial or national origin discrimination in federally assisted programs as applicable in some circumstances to employment (although the Act states that it covers employment only when the purpose of the assistance is to provide employment),[2] but this administrative construction of the statute seems not to have had any importance in enforcement. The Equal Pay Act, forbidding sex discrimination in pay, excluded administrative, executive and professional employees.[3] The discovery that the Reconstruction Civil Rights Acts (42 U.S.C. §§ 1981, 1983) might reach employment discrimination did not come until the late 1960's.[4]

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[1] Section 702 of Title VII (78 Stat. at 255 (1964) provided that "this title shall not apply with respect to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

[2] See, however, 45 C.F.R. § 80.3(c)(3); "The Executive Order Program — Administration in Higher Education" n. 49.

[3] Section 6(d)(1) of the Fair Labor Standards Act forbids sex discrimination in pay. Until the passage of P.L. 92–318, 86 Stat. 373 (1972) effective June 23, 1972, section 13(a)(1) excluded persons employed in a professional, administrative or executive capacity from section 6.

[4] See Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 56 (1972); *Braden v. University of Pittsburgh*, 477 F.2d 1 (3d Cir. 1972).

The situation is now very much changed. The Equal Employment Opportunity Act of 1972 extended Title VII to take in higher education and state and local governments.[5] The same statute added Title IX to the Civil Rights Act with the effect of prohibiting sex discrimination in federally assisted programs (unlike Title VI, the new provision includes discrimination in employment).[6] We are now learning that discrimination in employment on grounds of race violates 42 U.S.C. § 1981 and that race or sex discrimination by a state agency may violate 42 U.S.C. § 1983.[6a] In 1972 the exemption from the Equal Pay Act for administrative, executive and professional employees was eliminated. Higher education faculty now fall within an area covered by a number of overlapping but only partially consistent antidiscrimination measures.

Along with this development has come a multiplication of enforcement processes and of forums in which questions of discrimination may be pursued. When the Executive Order was the sole measure applicable to higher education institutions (those which were federal contractors) their employment practices were subject to the HEW compliance review process, and individuals could file complaints with HEW, thereby triggering the cancellation, termination and debarment process. It would appear also that the Justice Department could sue to enforce the contract, seeking an order compelling conformance with the equal employment opportunity clause.[7] Now that Title VII covers higher education an individual can file a complaint with the Equal Employment Opportunity Commission and then bring an action in federal court. A case of this kind may of course be brought as a class action. At the same time that the higher education exclusion was dropped, Congress gave EEOC the power to sue, so that the agency becomes a potential plaintiff in addition to the individual complainant. Increasingly, sections 1981 and 1983 of Title 42 are becoming established as alternative vehicles for individual and class actions raising issues of discrimination, 1981 with respect to discrimination against blacks, 1983 with respect to race and sex discrimination by state agencies. As a result of the recent extension of the Equal Pay Act to administrative, executive and professional employees, questions of sex discrimination in compensation among higher education faculty are open to investigation by the Wage and Hour Administrator of the Labor Department, on his own initiative or in response to a complaint. Either the Secretary of Labor or individual employees may sue to redress claimed violations of the Act.[8] The prevailing view has been that the Executive Order gives no basis to private parties for suit against contractors for alleged violation of the Order or its implementing regulations.[9] However, the law may now be shifting toward recognition of private actions based on the Order.[10] Title IX gives federal departments and agencies providing financial assistance a basis independent of the Executive Order for promulgating regulations dealing with sex discrimination in higher education; HEW, which provides much of the government's assistance to higher education, may become simultaneously the agent of the Labor Department in carrying out the contract compliance program on behalf of minority groups and women and the principal in its own program, in aid of women, setting conditions to any form of federal financial assistance. Title IX, however, merely forbids discrimination; unlike the Executive Order, it does not demand affirmative action. HEW's proposed Title IX regulations provide for affirmative action only as a remedy when discrimination has been established.[11] In this respect the proposed regulations resemble court decisions under Title VII in which quotas or hiring ratios have been imposed to remedy proven discrimination. Title IX also differs from the Executive Order in that the latter applies to all facilities of a contractor, including facilities not involved in performance of any federal contract, while under the former assistance may be denied or terminated only as to a "particular political entity or part thereof or other recipient" found out of compliance, "limited in its effect to the particular program, or part thereof " in which noncompliance is established.[12] While over-all supervision of the Executive Order program is centralized in the Labor Department, Title IX divides authority among all agencies providing financial assistance to higher education. HEW thus is not the only agency with responsibility under Title IX, and institutions receiving assistance from more than one federal source will find themselves coming under the jurisdiction of a number of agencies. It may be the case that the various agencies responsible for administration of the Executive Order and Title IX are subject to private actions seeking to require the agencies to conform to their own regulations, the Order or one or another statute.[13] To the extent this occurs, the agencies are forced to share authority for the formulation and administration of policy with the federal courts, and regulated employers cannot rely with entire confidence on agency interpretations.

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[5] Public Law No. 92–261 § 2, 86 Stat. 103 (1972) amended 42 U.S.C. § 2000e–1 to remove the exemption for educational institutions.

[6] 20 U.S.C. § 1681 *et seq.*, 86 Stat. 373 (1972).

[6a] With respect to § 1981, see Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 56 (1972); on § 1983 see, *e.g.*, *Smith v. City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973); *Cohen v. Miami*, 54 FRD 274 (S.D. Fla. 1972).

[7] Section 209(a)(2) of Exec. Order No. 11246 authorizes the Secretary of Labor to recommend to the Justice Department that proceedings be brought to enforce the equal employment opportunity clause.

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[8] FLSA § 16(b), 17 29 U.S.C. §§ 216(b), 217. Under section 16(b) employees may bring class action for damages, but "no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

[9] See *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3 (3d Cir. 1964).

[10] See *Lewis v. Western Airlines, Inc.*, 8 FEP Cases 373 (N.D. Cal. 1974). In Lau v. Nichols, 94 S.Ct. 786 (1974), the Supreme Court entertained on the merits an action brought by private plaintiffs claiming violation of HEW regulations issued pursuant to Title VI and incorporated in funding contracts between HEW and the defendant school district, a recipient of federal financial assistance. As Justice Stewart's concurring opinion points out, the defendants did not contest the standing of the plaintiffs to sue as beneficiaries of the contract (94 S.Ct. at 790 n. 2). Nevertheless, the decision may suggest that the Court is sympathetic to private enforcement of equal employment provisions in government contracts.

[11] See HEW, "*Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, Non-discrimination on the Basis of Sex*," § 86.3(a), 39 Fed. Reg. 22227, 22233 (1974)

[12] 20 U.S.C. § 1682, § 6 Stat. 374 (1972).

A single university may find itself in the following position. As a federal contractor it is obliged to refrain from discrimination on grounds of race, color, religion, sex and national origin and to take affirmative action to insure equal employment opportunity without regard to race, color, religion, sex or national origin. Its employment practices are subject to investigation by HEW as the compliance agency designated by the Department of Labor. Failure to conform to the requirements of the Executive Order program expose it to cancellation or termination of contracts and debarment as a federal contractor, and it may be sued by the Department of Justice in an action to enforce the equal employment opportunity clause. Conceivably, individuals who claim to have been injured by violations of the nondiscrimination or the affirmative action standards of the program may also sue as a kind of third party beneficiary of the equal employment opportunity clause. As an employer subject to Title VII the university may be sued by persons who have filed charges with the EEOC claiming discrimination in employment on grounds of race, color, religion, sex or national origin. Such cases may be prosecuted by a single person attacking a particular event — *e.g.*, termination — or as a class action on behalf of a large number of "similarly situated" persons in which very extensive and detailed judicial regulation of employment practices is sought. The same range of issues may arise in suits brought by the EEOC in response to a complaint. It seems clear that blacks who wish to avoid certain procedural requirements of Title VII can by-pass the EEOC and sue directly under section 1981 of Title 42. If the university is a state agency, members of other groups may be able to make parallel use of section 1983. Since the university receives various forms of federal financial assistance, it is obliged under Title IX of the Civil Rights Act to conform to whatever regulations HEW and other agencies may eventually issue to implement the statute's prohibition of sex discrimination in federally assisted programs. The same may be true of alleged employment discrimination on grounds of race, color or national origin under Title VI of the Civil Rights Act of 1964. If violations of the regulations are shown in an administrative hearing, the agency conducting the proceeding may require affirmative action or terminate or deny assistance. HEW's proposed regulations provide for individual complaints, and, here too, it is possible that individuals may be able to sue directly on the regulations. Finally, the university may find itself involved in disputes with the Wage and Hour Administrator or with individual employees over issues of compensation arising under the Equal Pay Act. Of course, many questions are common to more than one source of regulation. Thus, a claim of sex discrimination in pay could be raised under the Equal Pay Act, Title VII, Title IX or the Executive Order. At the same time, the same question can be posed differently depending upon the regulatory context in which it arises. Thus, one agency might conclude that a particular action was not "discriminatory" under Title IX while HEW might decide that the same action fell short of a commitment to "affirmative action."

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[13] In *Adams v. Richardson*, 480 F.2d the Court of Appeals for the District of Columbia Circuit held, *en banc*, that private plaintiffs could sue for an injunction requiring HEW to carry out the provisions of Title VI of the Civil Rights Act of 1964 by commencing proceedings to terminate federal financial assistance to segregated systems of education. See also, *Legal Aid Society of Alameda County v. Brennan*, F.Supp. (N.D. Cal. 1974).

There may be something to be said for this proliferation of antidiscrimination measures and enforcement mechanisms. It sets many guardians on employers and guarantees complainants a forum in which to press their claims. The inevitable collision of philosophies and the competition among divergent procedures may help clarify the goals of antidiscrimination policy and contribute to developing suitable methods of achieving them. But there are also costs which make the present, confused situation appear very doubtfully desirable.

These costs are of several kinds: (1) one proceeding conducted by one agency may duplicate another proceeding undertaken by another agency; (2) one agency may establish standards which conflict with standards developed by another agency; (3) different agencies may follow inconsistent interpretations of the same standards; (4) there is only limited assurance that a resolution achieved with one agency will be accepted by other agencies.

(1) EEOC investigations of Title VII complaints, agency investigations of Title IX complaints, HEW compliance reviews — whether under Title IX or the Executive Order — and investigations of the Wage and Hour Administrator all may cover some of the same ground. Unless the agencies standardize their investigatory procedures as much as possible, particularly their demands for information, multiple inquiries into the same events, employment patterns or personnel practices will prove needlessly burdensome to institutions and to the agencies themselves. For example, individuals sometimes file with OCR so-called class complaints on behalf of the complainant and all others similarly situated. After institutions of higher education came under Title VII and until recently, OCR's practice has been to refer the individual aspect of the case to EEOC and retain the "class" element of the charge for investigation by the appropriate field office. EEOC's demands for information can be very wide-ranging. Indeed, an exploration of a question of discrimination in an individual instance may require comparison among many similar cases, so that EEOC in effect may conduct much the same investigations as will OCR (or *vice versa*). If each agency fails to coordinate its approach with the other, they may repeat interviews with the

same people, demand information bearing on similar concerns but in different form and otherwise waste their own and others' resources. The practical difficulties of distinguishing class complaints from individual complaints has led OCR to reexamine its practice in this regard, but no clear solution has emerged.

(2) Different agencies may fall into conflict on the same issue. This possibility has been realized perhaps most dramatically in the case of insurance and pension and retirement plans, but questions of maternity benefit policy and testing standards supply additional examples.

All the agencies are concerned to prevent discrimination. It follows that men and women should receive equal treatment under insurance and pension and retirement plans. What has remained obscure is what treatment is equal. Because the costs of medical insurance (excluding pregnancy and pregnancy-connected disabilities) and retirement benefits apparently tend to run higher for women than for men, it is open to argument whether equal contributions by the employer or equal benefits to employees yields equality of treatment. Originally, the OFCC Sex Discrimination Guidelines accepted either equal contributions or equal benefits.[14] So did EEOC, in giving its interpretation of Title VII, and the Wage and Hour Administrator, in furnishing his interpretation of the Equal Pay Act.[15] EEOC has changed its view, and now takes the position that only equal benefits will satisfy Title VII.[16] OFCC has issued a proposed revision of the Sex Discrimination Guidelines which avoids commitment to either position, merely setting out both as alternatives without presently choosing between them.[17] The Wage and Hour Administration (like OFCC, an agency of the Labor Department) stands on its original position. HEW's proposed regulations under Title IX follow the Wage and Hour Administration.[18] Fortunately, perhaps, the meaning of "discrimination" in this context is open to litigation under Title VII, and the courts may ultimately resolve the question.[19]

The agencies appear to be arriving at a common view on maternity benefit policy, but only after a period of disagreement resembling the impasse over retirement benefits. OFCC's current version of the Sex Discrimination Guidelines obliges a contractor to extend maternity leave on the same terms (except one) that leave is given for other purposes under his existing leave policy. The exception has to do with length; maternity leave must be granted for a "reasonable" time. If the contractor has no leave policy, the regulation compels him to grant reasonable maternity leave and reinstatement to the same or equivalent employment.[20] These requirements are less rigorous than the demands of Title VII as interpreted in EEOC's Sex Discrimination Guidelines.[21] However, if OFCC adopts the proposed revision of its Sex Discrimination Guidelines the two agencies will come into congruent positions. In the OFCC's language, "medically verifiable disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are [,] for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance policies or sick leave plans available in connection with employment." Matters such as "the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance policies or sick leave plans" are to be dealt with on the same terms as "other temporary disabilities." However, if employees suffer termination because no leave or "insufficient" leave is available, the employer may be guilty of discrimination. This consequence follows if his policy follows with "disparate effect" on one sex, and he lacks justification in "business necessity." [22] The Wage and Hour Administrator takes no position on maternity benefits, holding to the view that they are not compensation for purposes of the Equal Pay Act.[23] The proposed regulations drafted by HEW under Title IX track the EEOC interpretation of Title VII and OFCC's proposed construction of the Executive Order.[24] Again, litigation under Title VII may give the courts the last word.

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[14] 35 Fed. Reg. 8888 (1970).

[15] This history is reviewed at 38 Fed. Reg. 35337 (1973). For the Labor Department's view, see 29 C.F.R. § 800.116(d) (1973) (Interpretive Bulletin on Equal Pay Act).

[16] 29 C.F.R. § 1604.9 (1973).

[17] 38 Fed. Reg. 35336 at 35338 (Dec. 27, 1973).

[18] See 39 Fed. Reg. at 22237, § 86.46(b)(2) (1974).

[19] *Cf. Rosen v. Public Sec. Elec. & Gas. Co.*, 477 F.2d 90 (3d Cir. 1973).

EEOC and OFCC have issued guidelines on testing and other employee selection procedures.[25] These are generally consistent with each other but probably inconsistent with Civil Service Commission practices in federal government employment. When the Federal Service Entrance Examination, developed and administered by the Civil Service Commission, was attacked in litigation as discriminatory against blacks, EEOC, as *amicus curiae*, asserted a position adverse to the Civil Service Commission.[26] (The plaintiffs' motion for preliminary injunction was denied and the case remanded to the Civil Service Commission for exhaustion of administrative remedies instituted after the action was filed.) An effect of this incident was to furnish a demonstration that one agency of government held a view of antidiscrimination policy sharply at variance with the conceptions of personnel selection followed by another agency with responsibility for administering the federal civil service. More recently, the Equal Employment Opportunity Coordinating Council, a group of agency representatives including EEOC and CSC, has collaborated on a set of uniform guidelines for testing and employee selection. Successive drafts of these guidelines have been circulating for many months but have not yet taken definitive form. HEW's draft regulations under Title IX seem to resemble OFCC and EEOC guidelines but are far less detailed. Questions of testing and employee selection are frequently raised in Title VII litigation; a number of courts have endorsed various aspects of the EEOC Guidelines, but some difficult problems remain unresolved.[27]

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[20] 41 C.F.R. § 60–20.3(g)(1973).

[21] 29 C.F.R. § 1604.10 (1973).

[22] 38 Fed. Reg. 35337 (1973) (§ 60–20.3(h)).

[23] 29 C.F.R. § 800.110 (1973).

[24] 39 Fed. Reg. at 22237 § 86.47(b)(1974).

[25] 29 C.F.R. 1607 (1973)(EEOC); 41 C.F.R. 60–3 (1973)(OFCC).

[26] The case is *Douglas v. Hampton*, 4 FEP 382 (D.D.C. 1972).

(3) Different agencies do not seem to share the same understanding of common techniques or strategies which they all employ. The proper use of "goals and timetables" illustrates this problem. "Goals" refers to projected proportions of minority and female employment in certain occupations or jobs utilized by an employer. "Timetables" are the periods of time in which the goals are expected to be reached. For example, a goal and timetable might predict that black employment in a certain job would expand from its current level of 2% in increments of 2% per year for five years, arriving at a total of 12% of employment in the job in five years' time.[28] Goals and timetables are a standard feature of affirmative action programs required by OFCC and its compliance agencies under the Executive Order. EEOC and the Justice Department have secured goals and timetables in negotiating settlements with employers in Title VII cases, and the courts have imposed them in some litigated cases as a remedy for past discrimination. The Civil Service Commission may also become involved with goals and timetables in seeking to prevent discrimination in federal personnel programs. A survey of federal officials from these agencies and the Commission on Civil Rights in September, 1973, appeared to disclose differences of emphasis and perhaps of underlying conceptions, as well as a certain vagueness, in appraising the device of goals and timetables.[29] For the Civil Service Commission, goals and timetables seemed to serve as a tool for measuring an employer's progress in administering a system of employment based on "merit." In varying degrees other agencies appeared to regard goals and timetables as something approaching a commitment to produce increased minority and

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[27] In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court endorsed generally the EEOC interpretation of Title VII as requiring that tests used for employee selection purposes be job related. How to interpret and apply this requirement remains problematic, as a number of cases illustrate. See, e.g., *Allen v. City of Mobile*, 466 F.2d 122 (5th Cir. 1972), *Spurlock v. United Airlines*, 475 F.2d 216 (10th Cir. 1972).

[28] Examples of goals and timetables, and of a process of calculating them, may be found in the OFCC "imposed" plans in the construction industry. See, *e.g.*, 41 C.F.R. 60–5 (1973) (the Washington Plan).

[29] See *Malbin, Non-Discriminatory Hiring*, 5 NAT'L J. REPS. 1400 (1973).

female employment.[30] Differences of degree and emphasis on the length of timetables and the size of goals, also revealed in the comments of agency officials, seem to reflect tension between a view of antidiscrimination action as a process designed to afford equal employment opportunity presently and in the future and a conception of antidiscrimination programs as a means of rapidly achieving the same pattern of outcomes as would have been obtained had there been no discrimination in the past. If past discrimination in society generally has had the effect of reducing the present qualifications, at least for some occupations, of minority groups and women, the latter view seems more likely to result in discrimination against whites and males than the former. It is not surprising, therefore, that agencies with a more result-oriented conception of affirmative action tended more to favor explicit consideration of race and sex in choosing among "equal" applicants and employees.[31] It is also noteworthy that four agencies — the Justice Department, the Labor Department, EEOC and the Civil Service Commission — had arrived at a common, written position on the use of goals and timetables in March, 1973. That document included the following passage:

> Under a system of goals, therefore, an employer is never required to hire a person who does not have qualifications needed to perform the job successfully; and an employer is never required to hire such unqualified person in preference to another applicant who is qualified; nor is an employer required to hire a less qualified person in preference to a better qualified person, provided that the qualifications used to make such relative judgments realistically measure the job in question, or other jobs to

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[30] A representative of the Civil Service Commission said, ". . . goals are not the be-all and end-all of affirmative action. In fact, they are not affirmative action at all, but are merely the means of encouraging affirmative action" and that, "a selecting official should have some flexibility in hiring, but he may not use race or sex as a criterion in making his final selection." *Id.* at 1404. A Justice Department spokesman said, "You have a mix of people who were actually discriminated against and you have a mix of people who were not but who, by conditions of their race and sex have historically been discriminated against. . . . Since you can't historically turn the clock back to know which are which, the judge takes some of the first group and adds a presumption that there are additional persons in the second group, and sets a goal." *Id.* at 1408. The Director of OFCC stated that as between two roughly equal candidates, " 'I would encourage the contractor to give the minority applicant every consideration,' rather than let the decision be made by lot." *Ibid.* Another official of OFCC said that "before Order No. 4 it was a matter of looking at techniques. Now we look at results" and stated also, "it's a simple fact that there has been discrimination in the past. Our purpose is to achieve a degree of utilization which would have existed had discrimination not occurred. The mere fact that a contractor is hiring in rough proportion to availability does not mean that the contractor is in compliance. It depends on the seriousness of the deficiency. You would expect the goals in many cases to be higher than the current availability in order to remedy past deficiencies." *Ibid.* The Civil Rights Commission has issued a statement which takes the view that, "An affirmative action plan must require some action that has not heretofore taken place, otherwise it is useless. . . . One of the requirements therefore is that in the subjective evaluations that always occur in the selection process one factor previously excluded should now be included — a concern that a reasonable number of qualified minorities and women be hired until equity is attained." *Id.* at 1409.

[31] Compare a statement by a CSC representative — "I personally don't believe minorities can expect to catch up in the employment situation until they also catch up in other areas which affect their employability, such as education and past employment service. A lot of elements in society have to come along. This has to be looked at in a total context. It has been happening. Blacks, for example, have been increasing their college enrollment. More and more women are going into occupational areas formerly considered male. Things are changing, but it is a gradual process. I don't see any overnight changes in the employment picture. A lot of people are looking for shortcuts, but shortcuts won't work. If you short-cut the idea of goals too much, leaving out the backup, they become quotas." *Malbin*, n. 30, *supra* at 1405 — with the Civil Rights Commission statement — "The best test for determining whether these aims are being achieved is by a results test. Whether expressed in terms of application, hires or promotions, the results test is the best test of whether women and minorities in fact are achieving the equal employment opportunities required pursuant to the twin aims of affirmative action." *Id.* at 1409.

> which he is likely to progress. The terms "less qualified" and "better qualified" as used in this memorandum are not intended to distinguish among persons who are substantially equally qualified in terms of being able to perform the job successfully. Unlike quotas, therefore, which may call for a preference for the unqualified over the qualified, or of the less qualified over the better qualified to meet the numerical requirement, a goal recognizes that persons are to be judged on individual ability, and therefore is consistent with the principles of merit hiring.[32]

These statements may appear categorical; in practice they turn out to be ambiguous. Without a fairly precise understanding of such critical terms as "qualifications," "realistic measures" and "equal" qualifications different persons can agree on this formulation while holding quite divergent views on the size of pools of qualified labor, what proportion of those qualified are equal and how quickly minority and female employment can be increased without reverse discrimination. It is by no means apparent that a common understanding of such questions has emerged.[33]

(4) Given the present situation of overlapping jurisdiction, inconsistent standards and diverging interpretations of policy, an institution of higher education cannot be confident that conformity to one agency's views of its obligations will satisfy other agencies. This is most clearly evident in the case of retirement benefits. In this instance a university can comply with all relevant agency interpretations of the law only by adopting an equal benefits formula. The courts may, of course, ultimately hold that this position is correct. On the other hand, they may not. Meanwhile, there is at the least a certain anomaly in a state of affairs under which a university must abandon a position one agency considers in compliance with law to take a different position another agency of the same government regards as legally required. The very vague character of dominant concepts — "discrimination," "goals and timetables," "qualified," etc. — referred to above and discussed more fully below, leads to less obvious conflicts in the approaches different agencies bring to administration of equal employment opportunity in higher education. Conflicts of this kind may surface on occasion, as in a celebrated case involving the Bogalusa, Louisiana, plant of Crown Zellerbach Corporation.[34] There, EEOC approved an alteration in the seniority system to redress the effects of past discrimination. This was overturned by OFCC, which imposed a new arrangement. The OFCC solution in its turn was attacked (successfully) by the Justice Department in litigation under Title VII. More commonly, discrepancies of view may remain concealed in the low visibility workings of administrative processes in which multiple agencies

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[32] "Memorandum for U.S. Attorneys, Field Representatives of the Civil Service Commission, Field Representatives of the Equal Employment Opportunities Commission, Field Representatives of the Office of Federal Contract Compliance — Subject: Federal Policy on Remedies Concerning Equal Employment Opportunities in State and Local Government Personnel Systems" (Mar. 23, 1973) 3–4.

[33] See n. 30, 31, *supra*.

[34] *Local 189, United Papermakers & Paperworkers, AFL-CIO v. United States*, 416 F.2d 980 (5th Cir. 1959), *cert. denied*, 397 U.S. 919 (1970).

settle the conditions of eligibility for grants and contracts and attempt resolution of complaints of discrimination.

There presently exists machinery for coordinating the work of agencies active in the antidiscrimination field. This equipment, however, does not yet appear to be in good working order. The Equal Employment Opportunity Act of 1972 added section 715 to Title VII of the Civil Rights Act to create an Equal Employment Opportunity Council, composed of representatives of the Labor Department, the Justice Department, EEOC, the Civil Service Commission and the Civil Rights Commission.[35] The Council has "responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders and policies." The principal achievement of the Council to date seems to be a set of draft guidelines on employee selection procedures. The Council deserves a great deal of credit for addressing what is probably the most crucial and difficult problem for antidiscrimination policy. On the other side, the Council has to be faulted for its failure to deal with the problem effectively. The Council's members have not agreed on a document they are prepared to publish, and the draft they have produced perpetuates some of the more notable inadequacies of the existing guidelines adopted by OFCC and EEOC. The four agency agreement on goals and timetables represents another praiseworthy, though only ambiguously successful, effort to achieve consistent interpretation of policy. There is also a section of the OFCC Sex Discrimination Guidelines providing:

> To avoid overlapping and conflicting administration the Director will consult with the Administrator of the Wage and Hour Administration before issuing an opinion on any matter covered by both the Equal Pay Act and Executive Order 11246, as amended by Executive Order 11375.[36]

The undertaking to consult, however, clearly does not insure agreement, as evidenced by OFCC's willingness to consider a position in conflict with that of the Wage and Hour Administrator on retirement plans. The efforts at coordination made so far lead in the right direction. They remain piecemeal approaches to one or another problematic feature of antidiscrimination policy and fail to reflect a comprehensive view of what that policy ought to be. The Executive branch seems to lack capacity to formulate a clear conception of policy and to secure obedience to it on the part of the responsible agencies.

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[35] 42 U.S.C. § 2000e–14, 86 Stat. 111 (1972).

[36] 41 C.F.R. § 60–2.5(c)(1973).

In many ways, despair seems the most appropriate response to the present state of affairs. In varying degrees, a number of agencies of the executive branch, the legislature and the courts have contributed to the tangle of overlapping jurisdictions, remedies and substantive standards which now exists. In all probability, it will never be entirely pulled apart and rationalized. It does not seem too much to ask, however, that at least the agencies of the executive branch concerned with equal employment opportunity should get out of each other's way, whether by deferring to some one agency on questions unique to a particular field, such as higher education, or by coming to a shared understanding on issues of common importance to all of them. Congress has already said there should be coordination; what remains to be done is actually to coordinate.

THE FAILURE OF ENFORCEMENT: HEARINGS AND SANCTIONS

On the surface, it would appear that the contract compliance program should furnish frequent occasion for administrative hearings directed toward the imposition of sanctions. Among the principal sanctions for noncompliance which the Executive Order provides are cancellation, termination or suspension of contracts and debarment of contractors.[1] The regulations contemplate regular compliance reviews, and no contract over $1,000,000 is to be awarded unless compliance on the part of the successful bidder has been established through a preaward review within the preceding twelve months.[2] Whenever a compliance review discloses that a contractor lacks an acceptable affirmative action program, or has "substantially deviated" from an approved affirmative action program, he must be declared nonresponsible;[3] the regulations provide that upon a second finding of nonresponsibility debarment proceedings must be commenced.[4] Furthermore, "when the Director [of OFCC] has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted." [5] Under Revised Order 14, as published in the Federal Register in February,

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[1] Exec. Order No. 11, 246 §§ 209(a)(5), (6).

[2] 41 C.F.R. § 60–1.20(d) (1973).

[3] 41 C.F.R. § 60–2.2(b) (1973): If, in determining such contractor's responsibility for an award of a contract it comes to the contracting office's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments or has substantially deviated from such an approved affirmative action program, the contracting office shall notify the Director and declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless upon review, it is determined by the Director that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgment, required prior to a determination that the contractor is nonresponsible. . . ."

[4] *Ibid.*

[5] 41 C.F.R. § 60–1.27 (1973).

1974, a compliance agency seemed to be required, within sixty days of receiving a contractor's affirmative action program, either to notify the contractor that he was in compliance or to issue a thirty day show cause notice.[6] Earlier versions were more vague as to the periods within which compliance agencies were to act but also looked toward a finding of compliance or issuance of a show cause notice.[7] Revised Order No. 4 requires the compliance agency to give a thirty day show cause notice "immediately upon finding that a contractor has no affirmative action program or has deviated substantially from an approved affirmative action program or that his program is not acceptable . . ." [8] While it is not certain that these provisions are wholly consistent,[9] it is clear that cancellation, termination and debarment serve as prompt alternatives, at least on paper, to satisfactory compliance. None of these sanctions may be imposed without offering an opportunity for hearing.[10] The Director may suspend existing contracts under the regulations, but only during the period proceedings for cancellation, termination or debarment are pending; when the Government has accepted the contractor's plan within the preceding twelve months even suspension must be preceded by a hearing, unless the contractor has "deviated substantially" from the plan.[11] The Comptroller General has ruled that progress payments due under a contract may not be withheld for violation of the equal employment opportunity clause without an opportunity for hearing.[12] Finally, the Equal Employment Opportunity Act of 1972 added to Title VII of the Civil Rights Act section 718, which provides:

> No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: *Provided*, that if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply. . . .[13]

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[6] 39 Fed. Reg. 5630 (1974). On July 8, 1974, the regulations were amended to make clear that extensions of time could be granted, 41 C.F.R. § 60–6.7, 39 Fed. Reg. 25665 (1974).

[7] Under 41 C.F.R. 60–60, 38 Fed. Reg. 13377 (1973) on-site investigations were to be conducted no later than forty-five days from the request to a contractor for his affirmative action program. 41 C.F.R. §§ 60–60.3(c)(2), (d) (1973). Within forty-five days of the initiation of the on-site investigation the contractor was to be notified that he was in compliance or a 30-day show cause notice was to issue. *Id.* at § 60–6.8. However, the compliance agency could grant an extesnion of time "for good cause, including an opportunity for the contractor to avail himself of conciliation. . . ." *Ibid.*

[8] 41 C.F.R. § 60–2.2(c) (1973).

[9] It is not entirely clear whether a thirty-day show cause notice is to issue upon a finding of noncompliance or after failure of conciliation following noncompliance or one or the other, at the discretion of the compliance agency or Director of OFCC or depending upon whether the deficiency is discovered in a preaward review, in a regular compliance review or in some other way.

[10] 41 C.F.R. § 60–1.26(b)(2) (1973).

[11] *Id.* at 60–1.26(b)(2)(iv) (1973).

[12] 52 COMP. GEN. 476 (1973).

[13] 42 U.S.C. § 2000e–17, 80 Stat. 384 (1972).

Government agencies award a large volume of contracts to institutions of higher education yet only a few of them have approved affirmative action plans. There has been ample opportunity for commencement of proceedings leading to cancellation or termination of contracts and debarment. The typical outcome of a compliance review is a finding of deficiencies in the institution's affirmative action program. Only a small number of plans have received final approval, a larger number have been rejected and many plans have remained pending for long periods of time. The Director has had authority to initiate enforcement proceedings whenever he believed a contractor had violated the equal employment opportunity clause. Findings of noncompliance after compliance reviews are supposed to trigger show cause notices. Given the length of time some programs have been held under review, it must be the case that two or more contracts over $1,000,000 in amount have been awarded to a single institution with no finding of compliance having been made. But Revised Order 4 prohibits the award of a contract in excess of $1,000,000 unless a preaward review has established compliance and requires a debarment proceeding upon a second finding of nonresponsibility. Many contracts are awarded to institutions which have never undergone a compliance review because OCR, in common with other compliance agencies, lacks the manpower to perform the tasks set down in the regulations. It is also true, however, that the conditions to sanction proceedings are routinely satisfied at institutions which are reviewed. Yet the Government has never moved seriously to invoke against an institution of higher education the sanctions provided in the Executive Order.[14] Why not?

Several reasons may be offered for the absence of formal sanctioning proceedings in higher education. It is possible that HEW lacks the political will to pursue the drastic remedies of cancellation, termination and debarment on any very wide scale or against influential contractors. The sanctions are so overwhelming as to deter their use. The government projects an attitude of ambivalence toward the program, reflecting the tension between the function of the government contract as a means of procuring required goods and services at the highest quality for the lowest cost and use of the contract as a regulatory technique. HEW has an alternative means of bringing pressure to bear on contractors (the contract freeze, discussed below) which avoids the commitment of time and resources entailed by formal enforcement proceedings and postpones the need to resolve the underlying tensions and dilemmas of the regulations, as well as the problems posed by their lack of fit to the conditions of higher education. These features of the regulations furnish an additional, formidable impediment to straightforward enforcement.

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[14] It is reported that the Office for Civil Rights requested HEW's General Counsel in November, 1971, to initiate steps leading to termination of Columbia University's federal contracts and debarment of Columbia as a government contractor. No hearing was ever held, however. See Wheeler, *The Role of University Counsel in Dealing with Equal Opportunity Compliance Problems*, 7 THE COLLEGE COUNCIL 249 (1972).

At least some OCR employees have entertained doubts about the willingness of politically appointed officials to support strong enforcement measures against contractors. Whether or not such doubts are well-founded, their existence probably serves to inhibit vigorous action by the people involved in the day to day work of the compliance program. How persistent, widespread and deepseated is the skepticism about the current administration's commitment to the program is hard to say. Some officials profess considerable confidence in the wholehearted support of highranking political appointees in the executive branch, others are noncommittal and still others acknowledge considerable uncertainty. If there is any general rule about the matter, it would seem to be that skepticism varies directly with the distance in the organization's hierarchy between the speaker and the highest levels of administration, but what this tendency may measure could be less the real attitude of the speaker than the degree of his willingness to speak candidly. A number of people in and out of government claim awareness of one or another incident suggesting that political considerations may have deflected the program's administration on some occasion. Naturally, it is quite difficult either to verify or to disprove allegations of this kind. It does seem fair to say that OCR does not reflect full confidence that the Department stands prepared to support stern enforcement measures.

The very severity of the sanctions creates another obstacle to their use. Debarment of a number of universities, including many of those at which OCR has concentrated its efforts, would inflict considerable damage. Probable consequences would include layoff of personnel, sharp curtailment or elimination of many research programs and constriction of educational and training opportunities, particularly for advanced students. Further, since universities are complex organizations very poorly described by the industrial model reflected in OFCC regulations, it is often difficult to frame clear issues and build a compelling case demonstrating that a university stands in default on a clearly stated and important requirement of the program. For example, much frustration has been encountered in developing satisfactory analyses of university workforces for the purposes of compliance review. Even to the initiated, an epithet OCR representatives infrequently deserve, a large university seems a confusing, if not chaotic, welter of job titles, disciplines, subfields and organizational units. OCR representatives and university officials have in some cases spent considerable time constructing suitable methods of collecting and reporting data on employees.[15] The problem of calculating deficiencies and setting goals among academic employees supplies another illustration. There has been lacking fully satisfactory means of establishing the availability of eligible minority and female candidates, especially in the case of minorities, but these determinations must be made to estimate underutilization and set goals. In consequence of difficulties of this kind, it is easy to find a university out of compliance but hard to say exactly what it should have done in order to comply. Review of a university becomes a process of mutual discovery of a series of intractable problems; the university may lag behind OCR demands and requests, but it can usually avoid falling into obvious recalcitrance. In this setting, extreme sanctions which fall heavily on "innocent" employees and students seem out of proportion to the university's fault. Consequently, they are not employed.

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[15] See the account furnished by a lawyer for Columbia University in Wheeler, n. 14 *supra*.

In addition to the paradox that, at a certain point, sanctions lose efficacy as they gain in power, contract compliance faces the dilemma that its sanctions injure the Government at the same time they hurt the university. One of the purposes of contract awards to colleges and universities is to strengthen the higher education system.[16] To withhold contracts in aid of antidiscrimination efforts thus serves to advance one federal policy at the expense of another. (The converse is true only if there is no feasible alternative to withholding of contracts.) But Government policies conflict still more sharply. The Government desires the goods and services it purchases through contracts with universities. Termination, cancellation and debarment further the Government's interest in improving the condition of women and minority groups but sacrifice the performance for which the Government has contracted and the contractor's capacity to assist the Government in achieving many of its goals. For example, it was reported that indefinite continuation of the recent freeze of contract awards at the University of California at Berkeley would have required cancellation of the Apollo-Soyuz space flight planned for July, 1975.[17] There will be disagreement, of course, over the appropriate ordering of priorities as between elimination of discrimination and achievement of various other objectives. The responsibility of monitoring compliance with the equal employment opportunity clause was separated from the function of awarding contracts precisely in order to increase the weight of antidiscrimination policy in the overall mix of governmental objectives represented by the Government contract device. The point remains that enforcement of equal employment opportunity involves a balance of gains and losses, and the responsible officials may sometimes conclude that the balance weighs against enforcement. At least some OCR officials see this tension in contract compliance quite clearly, and this perception contributes to their sense of isolation and to their suspicion that sanction proceedings will not be carried through to the end against important contractors.

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[16] See Wilson, *A Dilemma of American Science and Higher Education Policy: The Support of Individuals and Fields* versus *the Support of Universities*, 9 MINVERVA 171 (1971).

[17] See BNA, 42 Daily Lab. Rep. A12–A13 (Mar. 1, 1974).

OCR has available to it one method of bringing pressure to bear on contractors apart from the formal procedures of termination, cancellation and debarment. This method — the freeze on new contract awards — has been used on a number of occasions.[18] Revised Order No. 4 provides:

> If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments or has substantially deviated from such an approved affirmative action program, the contracting officer shall notify the Director [of OFCC] and declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless upon review, it is determined by the Director that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgement, required prior to a determination that the contractor is nonresponsible. . . .[19]

Under the Federal Procurement Regulations contracting officers are required to evaluate the "responsibility" of prospective contractors. For the most part, the criteria of responsibility — *e.g.*, financial resources, record of performance — have to do with the contractor's capacity to supply goods or services according to contract specifications.[20] However, in order to be considered responsible a prospective contractor must "be otherwise qualified and eligible to receive an award under applicable laws and regulations . . .," including Executive Order 11246 and its regulations.[21] If OCR is dissatisfied with a contractor's performance of his affirmative action obligations, it may announce that fact to contracting agencies, with the likely consequence that contracting officers will withhold findings of responsibility. So long as contracting officers are willing to defer to OCR determinations of non-compliance with Revised Order No. 4,[22] the agency is able to shut off the flow of federal contract money to the offending university for some (unknown) period of time. This technique permits OCR to induce concessions from contractors without incurring the substantial costs of time and resources demanded by formal proceedings. This tactic also allows OCR to demonstrate "progress" in expanding employment opportunities for minority groups and women while relieving the executive branch of the responsibility of taking a clear position on the meaning of affirmative action.

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[18] According to information supplied by HEW, delay of contracts has been utilized on some twenty-two occasions involving twenty institutions of higher education and nearly $28.5 million in contract awards (in some cases, no contracts were pending at the time the contract freeze was imposed). Letter from Cheryl Olkes, Public Information Office, OCR, to Sheldon Steinbach, ACE, dated Jan. 15, 1974.

[19] 41 C.F.R. § 60–2.2(b) (1973).

[20] Sec. 41 C.F.R. § 1–1.1203 (1973).

[21] *Id.* at § 1–1.1203(e); 41 C.F.R. § 1–12.8 (1973).

[22] Under 41 C.F.R. § 60–2.2(b) (1973) a declaration of nonresponsibility is made by the contracting officer. It is not clear that he is obliged to heed OCR's conclusions on the question of nonresponsibility.

These are only in part the functions for which the contract freeze was designed. It appears that OFCC saw in this technique the means of solving two problems. As described by a Solicitor of Labor, these were:

> First, the compliance agencies frequently ignored the Executive order's mandate that conciliation efforts continue for only a reasonable time, thus permitting dilatory contractors to protract "conciliation" for a period of several years; and, second, the adversary proceedings contemplated by Section 208(b) of the Executive order, even when promptly instituted, are time consuming and necessarily divert limited compliance resources from other program tasks.[23]

Under the most plausible interpretation of Order No. 4, the discovery that a contractor is deficient in meeting his affirmative action obligations should trigger a thirty day show cause notice as well as a finding of nonresponsibility. If the matter is not resolved during the thirty day period, there should follow a "notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts. . . ." [24] OCR seems unconstrained by this timetable, apparently feeling free to continue "conciliation, mediation and persuasion" beyond the time periods set by the regulations.[25] The compliance review tends to evolve into a negotiation process with a partly indeterminate outcome. This whole process is quite likely to consume many months and may never reach a definitive conclusion. In this process, show cause notices and the occasional contract freeze serve rather to restore movement to a stalled negotiation than to lend structure to an enforcement procedure leading either to the imposition of the prescribed sanctions or a determination of compliance with a set of ascertainable standards. It would seem that OFCC hoped to provide an informal and expeditious means of resolving compliance problems which could bypass formal hearing mechanisms and proceed to a terminal point within a finite time period. This objective assumes, however, that the compliance agency's task is primarily an administrative process of monitoring conformance to a set of determinate obligations described by the regulations. In reality, insofar as the regulations defy coherent application in the setting of higher education, the contract freeze comes to function as a pressure tactic in a bargaining process; delay of contracts helps to force agreement with a particular university while case-by-case negotiation of agreements allows OCR to escape the responsibility, which a litigation process might impose, of committing itself to a meaningful conception of affirmative action.

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[23] Nash, *Affirmative Action Under Executive Order 11, 246*, 46 N.Y.U.L. REV. 225, 253 (1971).

[24] C.F.R. § 60–2.2(c)(1) (1973).

[25] According to 41 C.F.R. § 60–2.2(c)(2), "During the 'show cause' period of 30 days every effort shall be made by the compliance agency through conciliation, mediation and persuasion to resolve the deficiencies which led to the determination of nonresponsibility." However, "if satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency, with the prior approval of the Director, shall promptly commence formal proceedings leading to the cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts under § 60–1.26(b) of this chapter."

It seems clear that OCR should not be dependent so exclusively on the extreme sanctions of termination, cancellation and debarment. Their very severity seriously inhibits their use. Consequently, it could easily occur that OCR might leave unremedied an institution's defaults on a wide range of individual matters because the only sanctions available to the agency seem excessively harsh.[26] It is unlikely, for example, that OCR will seek to debar a university because, in the agency's view, a department has discriminated on grounds of sex in denying tenure to a woman faculty member. On the other hand, to the extent that OCR is prepared to pursue debarment in such cases the university is likely to capitulate out of unwillingness to risk eligibility for contracts on the outcome of litigation over a matter of secondary importance to the institution as a whole. As a practical matter, a university for which government contracts are important will not deliberately risk its eligibility on the accidents of administrative litigation on any but the most gravely significant issue.[27] The present system creates the risks either that OCR obtains less than full compliance or that the agency imposes on institutions a version of their obligations which would not survive the test of litigation.

These unsatisfactory alternatives are partly due to the ambiguous and indeterminate character of the regulations. On one hand, institutions are uncertain as to the nature and extent of their obligation and, on the other, OCR's findings of compliance or noncompliance have a large element of pure discretion. In addition to revision of the regulations themselves, it would seem desirable to seek better definition of the program's requirements through the process of "elucidating litigation." This process will not go forward, however, within the framework of the present system of sanctions. Either OCR will not invoke them or the institution will make the minimum concessions necessary to avert the risk of debarment.

Two reforms seem desirable to correct this situation: (1) OCR should have at its disposal a system of graduated sanctions; (2) OCR should not be able to impose any sanction without an opportunity for prior hearing. The first of these is no simple matter to arrange. Essentially it is a matter of providing by contract for the range and flexibility of judicial remedies.

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[26] See Fisher, *The Carrot and the Stick: Conditions For Federal Assistance*, 6 HARV. J. LEGIS. 401 (1969), for a description of this dilemma.

[27] 41 C.F.R. § 60–1.24(c)(4) provides: "Where a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of an agency or the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within ten days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action by the agency or the Director." It does not appear that this procedure has ever been utilized. For this there may be several reasons. Contractors dislike challenging the Government for fear of prejudicing the award of future contracts. Action once taken can be difficult to undo later — *e.g.*, a grant of tenure to a complainant. OCR tends to avoid "orders" or "recommendations" in favor of pointing to "deficiencies" (*e.g.*, inadequate workforce analysis, availability not sufficiently established), and the requirements of the program are so vague and open-ended that a contractor can ordinarily assume he is out of compliance. Indeed, it may be doubted that OCR has been entirely satisfied even with those few plans it has approved, to say nothing of OFCC. To contest an order, therefore, invites a retaliatory debarment proceeding, and this poses serious risks.

The penalties for violation of the regulations or departures from an affirmative action program should be heavy enough to discourage frivolous contests for purposes of delay or obstruction but not so overwhelming that institutions feel compelled to abandon genuinely held positions on serious questions. Sanctions should be adequate to deter but not so devastating that they either are not employed or impose losses out of proportion to the institution's default or coerce compliance to debatable interpretations of the regulations. Depending upon circumstances, sanctions for demonstrated violations have one or more of three functions to perform: (1) to deter future violations of the regulations generally, by the respondent and others, (2) to compel a respondent to conform a continuing cause of conduct to the requirements of the program, (3) to make whole injured persons. A dispute might arise over an institution's recruiting practices, an example of (2) above. If those are shown to fall short of compliance with the institution's obligations under the Executive Order, the indicated remedy is the equivalent of an injunction. On the other hand, if an institution fails in a few individual instances to perform its commitment to advertise openings, an illustration of (1), a monetary penalty, the equivalent of a fine, might be appropriate. Finally, it may be desirable in some cases to provide remedies for individuals — *i.e.*, a promotion or grant of tenure.

The Executive Order, as it stands, does not lend itself to a remedial scheme of this kind. It would be possible for OCR to seek termination or cancellation of a particular contract or a "portion thereof" [28] without attempting debarment as well. This would be a crude solution since it would tie the possible range of remedies to an institution's pattern of contracts and would allow only limited flexibility in the choice of remedy. It would also have undesirable side effects on the institution's activities and employees involved in the contract and on the contracting agency. More satisfactory would be amendment of the Executive Order to permit promulgation by regulation of a scale of monetary penalties to which institutions would consent in entering into govermment contracts. These would be imposed for violations either admitted by institutions or proved through the existing hearing procedures (subject to judicial review). Penalties in appropriate amounts would either be imposed, as in cases in which fines are appropriate, or forgiven upon compliance with the obligation established through litigation, as when a change in practice or provision of remedies to individuals is demanded from the institution. The debarment sanction could be retained for cases of continued recalcitrance.

A solution of this kind would work awkwardly or imperfectly in some cases. Since it would almost certainly prove infeasible to specify in advance what penalties would be appropriate for which violations, the question of penalty would often have to be litigated along with the underlying issue of the violation itself. Consequently, OCR might be tempted to claim large penalties to gain bargaining leverage, thereby circumventing the hearing process. Also, such a system would function most effectively with institutions which rely heavily on government contracts, much less well with institutions which contract with the Government only sporadically or for small amounts. Defects like these, however, simply reflect the distortions and anomalies which accompany the use of the government contracts as a regulatory device. As always, proposals have to be judged against existing arrangements and practical alternatives.

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[28] Executive Order 11, 246, in section 209(a)(5), provides for cancellation, termination or suspension of a contract or "any portion or portions thereof."

The availability of an adjudicative process does not insure that it will be used. As long as OCR can exert significant pressure on institutions outside the framework of formal sanctions, the program's content may continue to depend more on what the agency has the strength to negotiate than on what the regulations can be shown to require. At present, termination or cancellation of contracts and debarment can take place only upon opportunity for prior hearing. However, the agency claims the power simply to declare an institution a nonresponsible bidder for inability to comply with the equal employment opportunity clause, and this technique, by damming the flow of contract funds to the institution, may enable OCR to win concessions which may exceed what can properly be imposed.[29] It is open to doubt whether the compliance agencies actually have authority to make findings of nonresponsibility without affording an opportunity for hearing.[30] However that may be, it would seem desirable as a matter of policy to force OCR to formulate an intelligible conception of the program and demonstrate its legitimacy by channelling enforcement away from the administrative mechanism of the contract freeze and into an adjudicative process.

The same considerations apply to administration of Title IX, forbidding sex discrimination in federally assisted education programs and activities. Section 902 provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become

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[29] The use of the contract freeze to settle dispute over the meaning of the regulations is comparable to resort to strike in preference to arbitration to resolve a question arising under collective bargaining agreements. In both situations a test of strength determines issues of interpretation.

[30] In *Crown Zellerbach Corp. v. Wirtz*, 281 F.Supp. 337 (D.D.C. 1968), the court enjoined the Secretary of Labor from, *inter alia*, temporarily suspending the plaintiff corporation from further business with the government prior to a hearing on the plaintiff's compliance status under Executive Order No. 11, 246.

> effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been refound, or (2) by any other means authorized by law: *Provided, however*, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.[31]

HEW's draft regulations under Title IX provide for suspension of assistance while formal proceedings to terminate or deny assistance are pending.[32] To the extent that assistance is critical to the recipient institution, it will be true under Title IX, as under the Executive Order, that interruption of funds will lead to a negotiated outcome, circumventing the procedures of hearing and judicial review afforded by the statute as well as its machinery for legislative oversight. It would seem as desirable in the administration of Title IX as in that of the Executive Order that any cut-off of funds follow, rather than precede, the adjudicative procedure the statute provides.

Precisely the same argument holds for Title VI of the Civil Rights Act of 1964, which Title IX simply repeats in the respects relevant here.[33]

THE DILEMMA OF ENFORCEMENT: UNADMINISTRABLE STANDARDS OF MERIT

The Executive Order forbids discrimination and requires affirmative action. Neither of these terms lends itself to straightforward application. Labor markets are inherently discriminatory; one of their functions is to allocate a good in short supply relative to demand. The formula "discrimination on grounds of race, color, religion, sex or national origin" seems to mean that these attributes are not to figure in the discriminations among persons which employment decisions inevitably effect. On one view, claims of discrimination turn on the question whether or not the employer took these characteristics into account, using them as standards to guide his decisions. Discrimination poses fundamentally a psychological issue, and the employer's intentions are crucial. If it appears that his decisions do not vary depending, for example, on the race of applicants or employees, he cannot be guilty of racial discrimination. What considerations apart from race may determine his decisions are immaterial. The employer can discriminate on any basis he chooses, other than race. If, for example, an employer refuses to hire applicants who have arrest records, his practice is nondiscriminatory even though a larger proportion of blacks than of whites have arrest records. At one time this notion of discrimination as conduct resulting from an intention to discriminate on prohibited grounds seems to have marked the limit of the legal conception of discrimination.[1]

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[31] 20 U.S.C. § 1682, 86 Stat. 374 (1972).

[32] 39 Fed. Reg. 22238–39 (1974) (§ 86.63(b)).

[33] 42 U.S.C. § 2000d–1, 78 Stat. 252 (1964).

On another view of the matter, racial discrimination need not rest on an intention to discriminate on grounds of race but may exist even where there is an intention not to discriminate in this way. Now, claims of discrimination depend on the effects of the employer's practices. If their effect is disproportionately to disadvantage blacks as against whites, the employer has discriminated on grounds of race.

Of course, the question arises, disproportionate with respect to what? One answer might be, with respect to the fraction of blacks in the labor force. Another answer would be, with respect to the relative "merit" — *i.e.*, job performance — of blacks and whites in the labor force. These two answers might come to the same thing if it were the case that capacity for job performance were equally distributed among blacks and whites for all jobs.[2] This is, however, not the case. For example, a lower percentage of blacks than whites possess what society insists upon as a necessary minimum of training for the practice of medicine. The cumulative impact of the black experience in the United States has the consequence that relative capacity across the entire range of jobs in the economy (in the sense of "present" as opposed to "innate" capacity) is not proportionately distributed between the two racial groups. It makes a difference whether discrimination against blacks is defined as, employing a lower proportion of blacks in particular jobs than their proportion of the labor force, or as, employing less able whites than available blacks. The former definition may serve as a measure of discrimination in society, but it is unlikely to furnish a test of unlawful discrimination unless modified to include a standard of minimum qualification. At least three considerations combine in favor of the latter definition. It serves an interest in efficiency. It gives effect to the view that the person who will perform a job best deserves the job. It rejects race as a criterion of selection. When discrimination is understood in this way, the case of the employer who rejects applicants with arrest records needs to be reexamined. Unless arrest records signal some disqualifying trait for the job in question, this employer discriminates on grounds of race.[3] It is this second conception of discrimination as decisions which, whether or not intentionally, fail to match racial patterns of employment with capacity for job performance that approaches the contemporary legal meaning of discrimination.[4]

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[1] See Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co.* and the Concept of Employment Discrimination, 71 MICH. L. REV. 59, 66–75 for an account of the evolution of the legal concept of discrimination.

[2] They would not necessarily amount to the same thing. If, for example, blacks and whites differed in their relative access to employment opportunities — owing to residential patterns and plant location — disproportionately high numbers of blacks or whites might be employed even though the capacity of the two groups was equal.

This expansion of the meaning of discrimination reduces the scope of affirmative action, as used in the Executive Order. If discrimination meant only knowing or intentional departures from the principle of selection according to capacity for job performance, then a duty to take affirmative action could be used to alter unintentional or inadvertent practices with the same effect. It may be, for example, that an employer's failure to recruit aggressively among minority groups and women is not discrimination. If so, however, a duty to recruit may be imposed as part of a federal contractor's affirmative action obligation.[5] But affirmative action on behalf of minority groups and women reaches its limit at the point of discrimination against whites and men. Although the Constitution may permit the Government to require preferences to members of disadvantaged groups, it appears that federal law at present forbids discrimination for as well as against such groups. Thus Title VII prohibits discrimination on grounds of race or sex, not discrimination against blacks or women, and the Supreme Court has read the statute as saying that "discriminatory preferences for any group, minority or majority, is precisely and only what Congress has proscribed." [6] Since Title VII covers federal contractors, it is very doubtful that the contractual stipulation for affirmative action could require reverse discrimination.[7] In any case, it seems that the Executive Order itself bans discrimination against whites or males.[8] Although the obligation to take affirmative action is said to require something more than nondiscrimination, the duty not to discriminate for or against persons on grounds of race, color, religion, sex or national origin limits the reach of affirmative action. As the meaning of discrimination comes to take in more ground affirmative action "to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin" comes to be squeezed more and more tightly against the ban on discrimination hostile to persons of any race, color, religion, sex or national origin.

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[3] In *Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972), the court held that the use of arrest records as a screening device violated Title VII on the grounds that the device disproportionately disadvantaged black applicants and had not been shown to further a reasonable business purpose.

[4] This proposition emerges from decisions establishing the principles that racial imbalance may create a *prima facie* case of discrimination, that findings of discrimination do not require proof of intention to discriminate and that racially neutral selection criteria which adversely affect minority groups are unlawfully discriminatory unless shown to be related to job performance. For a discussion of these principles see Larson, *The Development of Section 1981 as a Remedy For Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV.-LIB. L. REV. 56, 90–96 (1972).

[5] In *In re Allen Bradley*, CCH EMPL. PRAC. GUIDE ¶¶ 8065, 8070 (OFCC 1968, 1969), recruitment from walk-in applicants was considered to violate the contractor's affirmative action obligation rather than his duty not to discriminate.

[6] *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

[7] See 42 OP. ATT'Y GEN. No. 37 at 11 (1969), *cf.*, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[8] Thus, the Executive Order does not prohibit discrimination against minority groups and women but discrimination on grounds of race or sex. Order No. 4 provides that "The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligations. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin." 41 C.F.R. § 60–2.30. HEW's "Higher Education Guidelines: Executive Order 11246" state: "A university contractor must carefully and systematically examine all of its employment policies to be sure that they do not, if implemented as stated, operate to the detriment of any persons on grounds of race, color, religion, sex or national origin." **** "The *nondiscrimination* requirements of the Executive Order apply to *all* persons, whether or not the individual is a member of a conventionally defined 'minority group.' In other words, *no* person may be denied employment or related benefits on grounds of his or her race, color, religion, sex or national origin." HEW, "Higher Education Guidelines: Executive Order 11246," 2–3, 3 (1972) (emphasis in original).

The cumulative effect of the duties to refrain from discrimination and to take affirmative action is to compel employee selection according to job performance, actual or predicted. A contractor's failure to employ members of minority groups and women in each job in the proportions indicated by their relative capacity for performance suggests that he has been derelict in taking affirmative action if, indeed, he has not discriminated. On the other hand, to the extent that he has favored minority persons or women over whites or males of superior job performance capacity he has been guilty of reverse discrimination. To be workable at all, the contract compliance program must have an administrable conception of job performance. It is at this point that the program suffers breakdown in its application to faculty employment.

Administration of the contract compliance program is facilitated by certain conditions. The regulations assume that the contractor is an organization characterized by an hierarchical authority structure, with a centralized management capable of establishing a system of personnel rules and monitoring conformance to the rules by subordinates. Entry level jobs require little training, experience or education beyond that widely distributed in the population at large and any additional necessary skills are acquired during employment. The content of jobs is clearly understood, as when the technology of production defines the job, and criteria of performance are subject to objective measurement. There is an effective ceiling on performance imposed by the character of the job itself or, at least, there is an average level of performance defined as successful which is commonly attained. Faculty employment in higher education stands in marked contrast. In matters of employment and promotion the institution's authority tends to be widely diffused to departments and schools, and there is considerable participation by faculty in faculty personnel matters, amounting at times almost to control. Entry into faculty employment typically follows a lengthy and intellectually demanding period of training, and entry may only serve to commence a probationary period of several years duration, often with no assured outcome. The professor's role is very complex and the variation in performance quite wide. The work is highly specialized, and much of it, especially research, can only be judged by experts. Criteria of performance are vague and subject to dispute. Nevertheless, they tend to produce rankings of people within a field rather than broad groupings. In this setting, it is possible to estimate how well various groups have succeeded, but difficult to determine how much of observed differentials result from illegal discrimination by institutions and how much from varying tastes or preferences and the cumulative effect of such influences as socialization or discrimination in society at large.

A considerable amount of work has been done on the position of women among higher education faculty.[9] This work strongly suggests some degree of sex discrimination. At the same time, it helps to illustrate why the contract compliance program furnishes a very problematic remedy. According to a recent study by the Office of Education, women comprise some 22.5 percent (57,297) of full-time college and university faculty on nine- and ten-month contracts (total: 254,930). The average salary of women for the 1972–73 academic year was $11,862, that of men $14,352. The following table shows the rank and salary distribution of male and female faculty (1972–73):

	Total		Universities		Other 4-year		2-year	
Rank and sex	No. of faculty	Average salary	No. of faculty	Average salary	No. of faculty	Average salary	No. of faculty	Average salary
Total	254,430	$13,793	95,524	$15,231	121,014	$13,052	38,392	$12,556
Men	197,633	14,352	79,222	15,829	92,676	13,496	25,735	12,889
Women	57,297	11,865	16,302	12,325	28,338	11,601	12,657	11,862
Professors	55,890	18,911	27,980	20,741	25,480	17,156	2,430	16,231
Men	50,325	19,128	26,135	20,931	22,296	17,273	1,894	16,544
Women	5,565	16,950	1,845	18,050	3,184	16,620	536	15,122
Associate Professors	54,479	14,353	24,954	14,591	30,233	13,849	4,302	14,426
Men	49,674	14,481	21,684	15,063	24,764	13,974	3,226	14,459
Women	9,805	13,704	3,270	14,207	5,459	13,280	1,076	14,327
Assistant Professors	87,049	12,043	32,038	12,442	46,845	11,745	8,166	12,181
Men	66,190	12,233	25,535	12,594	35,098	11,967	5,557	12,259
Women	20,859	11,437	6,503	11,845	11,747	11,083	2,609	12,015
Instructors	55,512	10,613	10,552	9,749	18,446	9,401	23,494	11,954
Men	31,444	10,964	5,868	10,009	10,518	9,550	15,058	12,325
Women	21,068	10,089	4,684	9,423	7,948	9,204	8,436	11,292

More sophisticated studies indicate a rather complex set of explanations underlying data like these. For example, one of the more probing investigations appears to demonstrate that part of such differentials in rank and pay as those shown above is due to factors like differences in highest degree held, interest in teaching as against research, publication, academic discipline and type of parent institution.[10] Thus, it is reported that "women college faculty are only about half as likely as men faculty to hold a doctorate." [11] Women are more highly concentrated in lower paying fields, more often indicate primary interest in teaching than in research, publish less and are employed disproportionately in two-year institutions. Women appear less mobile than men, apparently with a negative effect on their salaries. Even after allowance is made for differences between male and female faculty of this kind, however, significant discrepancies remain. The authors conclude that:

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[9] ACADEMIC WOMEN ON THE MOVE (Rossi ed. 1973) is a convenient collection of material representative of the literature which undertakes to demonstrate the disadvantaged position of women in higher education.

> If the same criteria, with the same weights, were applied in awarding rank to women as are applied to men . . ., the average compensatory *increase in rank* would be from slightly below to somewhat above the assistant professor level, an average of one-fifth step. To award women the same salary as men of similar rank, background, achievements, and work settings . . . would require a compensatory *average raise* of more than $1,000 (1968–69 standards). This is the amount of salary discrimination which is *not* attributable to discrimination in rank. The amount of *actual* salary discrimination, attributable to discrimination in advancement, would substantially increase this figure.[12]

Further, some of the choices women make which help account for their lower pay and rank may not be choices at all but additional handicaps imposed by discrimination. Hiring discrimination may restrict their access to better paying institutions, and they may be given fewer opportunities in administration and research than they deserve.[13]

On the other hand, many women may make certain career choices which tend to limit their professional success but which accurately reflect their interests and their perception of their abilities. In any event, some part of the differential between men and women faculty seems not to be the result of failure to apply existing academic standards evenhandedly but rather a consequence of their application. Thus, high scholarly productivity is rewarded, and this tends to favor male faculty. However, the standards themselves may be attacked as unfairly discriminatory. The study just quoted from illustrates a common approach:

> Sex discrimination in academe does not begin when a woman accepts an appointment at a college or university. Rather, its roots reach far back to the cumulative effects of earlier sex differentiation processes and discrimination: early childhood socialization for "appropriate" sex roles, different treatment and expectations accorded to boys and girls by their parents, teachers, and peers throughout adolescence and early adulthood, differential opportunities for access and admission to undergraduate and graduate school, and so forth. As a result, when they enter teaching careers in

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[10] Astin & Bayer, *Sex Discrimination in Academe*, EDUCATIONAL RECORD, Spring, 1972, 101, 103.

[11] *Ibid.*

[12] *Id.* at 115.

[13] *Id.* at 116.

> colleges and universities, most women have interests, aspirations, expectations, educational backgrounds, and life experiences that differ from those of their male counterparts. Once on the faculty, women experience a second barrier to equality with men: the academic reward system is biased toward behaviors and activities exhibited more often by men than women. Indeed, the content of the academic reward system was established by men, so rewards go primarily to those women who accept and share men's criteria for academic rewards. Thus, administration, research and publications, which men engage in to a greater extent than women, receive higher rewards than teaching, which women devote more time to than men. This reward system is far from ideal and may even be dysfunctional to the educational objectives of American colleges and universities. Indeed, the system should be examined and restructured.[14]

This passage strikes two themes: the theme of the mute inglorious Milton and that of the ugly duckling. On one side, women are differentiated from men by socialization processes which stultify their innate capacity for intellectual roles; on the other, women are different from men in ways which enhance their capacity for service in higher education, once it is understood that the faculty role should properly be defined by a different set of characteristics than it is at present. Anyone who has worked on a university campus during the past several years must by now be familiar with both these themes, developed in the case of minority groups besides that of women, as well as with the claim that women who perform indistinguishably from men are less well rewarded nonetheless. Considerable evidence can be mustered in support of the last proposition. Neither of the first two is clearly wrong by any means. Together, they set a dilemma for policies aimed at producing "equal opportunity." There is reason to believe that existing standards have not been applied evenhandedly across sex lines in a significant number of cases. It may also be true that one or more groups protected by the Executive Order and legislation might still fare less well, on average and for some period of time at least, than whites and males under a regime of perfect consistency in the application of standards of faculty employment. It might also be true that a reformulation of standards would improve the position, *e.g.*, of women relative to men. Whether they should be reformulated, and how, squarely poses the issue of "merit" in faculty employment and raises, in turn, the question of how the mission, or missions, of higher education should be defined. OFCC's regulations are incapable of speaking to such questions intelligibly. Taken literally, however, the regulations preempt them. This dubious objective they achieve by imposing an impossible burden of demonstration on judgments of academic merit.

A contractor's obligation to take affirmative action follows from the discovery of underutilization in his workforce. The regulations define "underutilization" as "having fewer minorities or women in a particular job classification than would reasonably be expected by their availability." [15] A notion of availability implies possession of attributes important for successful job performance; a person cannot be said to be available for a position in any meaningful sense if he lacks capacity to perform it. In calculating underutilization, the contractor is to "consider . . . the general availability of minorities [women] having requisite skills in the immediate labor area" and "the availabilities of minorities [women] having requisite skills in an area in which the contractor can reasonably recruit," as well as "the availability of promotable and transferable minorities [female employees] within the contractor's organization." [16] What attributes, or skills, a job demands, however, is no less a judgment than the decision who, among a number of candidates, possesses them in greatest measure. Misevaluation of the requirements of a job and of the job-related characteristics of the persons considered both could be systematically biased against women or minority persons. Where this occurs, it will result in "adverse effect" — technically, "a differential rate of selection (for hire, promotion, etc.) which works to the disadvantage of a covered group." [17] Misdefinition of the job may lead to underutilization also, but avoid adverse effect in this narrow sense. This will happen if members of minority groups and women who do have "requisite skills" are discouraged from applying (or are not considered) because they possess less often than whites or men the superfluous attributes the contractor requires. The regulations take account of this possibility. Contractors are instructed that "special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination." [18] Further, "where requirements screen out a disproportionate number of minorities or women such requirements should be professionally validated to job performance." [19] How one determines that a screening effect is disproportionate in impact is left unsaid. However, "Testing and Selection Order Guidance Memorandum No. 7a," recently issued by the Department of Labor, speaks to the general problem with unusual clarity:

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[14] *Id.* at 101.

> 12. Q. May a contractor utilize unvalidated selection requirements in deciding the availability of applicants with requisite skills when using Revised Order No. 4 criteria to establish goals?
>
> A. No.[20]

Thus, who is available and, hence, whether there is underutilization (including adverse effect), together with the extent of underutilization, at least partly depends upon selection requirements. To insure detection of inaccurate measures of availability resulting from faculty selection requirements, those requirements must be validated. What is validation?

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[15] 41 C.F.R. § 60–2.11(a) (1973).

[16] *Id.* at §§ 60–2.11(a)(1)(iv), (v), (vi), 60–2.11(a)(2)(iii), (iv), (vi). See also 41 C.F.R. § 60–2.11(a)(2)(v): "The availability of women seeking employment in the labor or recruitment area of the contractor."

[17] U.S. LAB. DEP'T. EMPLOYMENT STANDARDS ADMINISTRATION, OFCC, *Testing & Selection Order Guidance Memorandum No. 7a*, "Question & Answer 7" (1974).

[18] 41 C.F.R. § 60–2.24(b) (1973).

[19] *Ibid.*

[20] *Testing & Selection Order Guidance Memorandum No. 7a*, n. 17 *supra*, "Questions & Answers" 12.

According to the Guidance Memorandum, "validation is the demonstration of the job relatedness of a selection procedure." [21] Under the Testing and Selection Order, there are three methods of showing the necessary relation between a position and a procedure used to select for it: criterion-related validity, content validity and construct validity.[21a] The regulations provide technical standards for establishing criterion validity and content validity (but not construct validity). Satisfaction of these standards would appear to depend upon the use of "tests," which are defined as follows:

> For the purpose of this order, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. This order applies, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, training, or retention. This definition includes but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" also covers all other formal, scored, quantified or standardized techniques of assessing job suitability including, for example, personal history and background requirements which are specifically used as a basis for qualifying or disqualifying applicants or employees, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales and scored application forms. . . .[22]

There may be selection techniques employed which are not "tests." The regulations deal with these in the following manner:

> Selection techniques other than tests, as defined in § 60–3.2, may be improperly used so as to have the effect of discriminating against minority groups or women. Such techniques include, but are not restricted to, unscored or casual interviews, unscored application forms and unscored personal history and background requirements not used uniformly as a basis for qualifying or disqualifying applicants. Where there are data suggesting employment discrimination, the contractor may be called upon to present evidence concerning the validity of his unscored procedures regardless of whether tests are also used, the evidence of validity being of the same types referred to in §§ 60–3.4 and 60–3.5. Data suggesting the possibility of discrimination exists, for example, when there are higher rates of rejection of minority candidates than of nonminority candidates for the same job or group of jobs or when there is an under-

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[21] *Id.*, "Questions & Answers" 3.

[21a] These types of validity are defined as follows:

Criterion-related validity — A statistical demonstration of a relationship between a selection device and the job performance of a sample of workers.

Content-validity — A demonstration that the content of a selection device replicates job duties disclosed in the job analysis, or measures job knowledge, or skills shown to be critical and essential for immediate performance on the job.

Construct-validity — A demonstration that (a) a selection device is a measure of the construct (*e.g.*, honesty) and (b) the construct is related to actual job performance.

Ibid.

[22] 41 C.F.R. § 60–3.2 (1973).

> utilization of minority group personnel among present employees in certain types of jobs. . . .[23]

Since selection techniques can only be validated under the criteria given in the regulations for tests, which entail quantification, it is hard to see how any procedure other than a test can be validated. Rather, if validation is necessary, it would seem that a test must be substituted. Confirming this impression, the Guidance Memorandum says:

> Although unscored interviews or applications are not specified in the definition of a test, these procedures also come under the requirements of the Testing and Selection Order if they have the effect of discriminating against minorities or women (sec. 60–3.3). In these cases the contractor must either eliminate the adverse effect or quantify the procedures (i.e., make them into "tests") so that they can be validated. Therefore, all selection procedures are covered by the Testing and Selection Order.[24]

Of course, validation is demanded only when there exists "data suggesting employment discrimination." The Guidance Memorandum states, "If there is no finding of adverse effect, there is no validation requirement." [25] However, under the Testing and Selection Order, an implication of discrimination may be suggested not only by differential rejection rates according to race or sex (adverse effect) but also by the residual phenomenon of underutilization. Underutilization depends upon availability, and availability cannot be determined by unvalidated selection requirements.

How feasible is validation? At best, it seems, validation is difficult and expensive. The cost and difficulty is markedly increased by the requirement that "differential validity" be demonstrated — *i.e.*, that a test be separately validated for groups in the relevant population separated by race and sex. The utility of establishing differential validity seems to be in controversy among psychologists.[26] Otherwise, the criteria of validity may well reflect something approaching a consensus of informed professional judgment on the conditions justifying high confidence in a test; they are taken over from a manual of the American Psychological Association. What is less clear is how widely those conditions may be feasibly achieved.[27] That they can be satisfied at all readily seems doubtful in the case of a great deal of professional employment.

For example, take the requirement of a Ph.D. as a condition of employment in academic positions. This might well be considered a "test." Is a university to hire one hundred persons with the degree and one hundred without and then compare the performance of the two groups? Presumably, the definitive comparison would take place after several years — something like the presently established period for tenure review. How would one eliminate the possibility of "supervisory bias" in evaluations? Is it possible the Ph. D. is job related for university positions in the physical sciences but not in foreign languages? In one subfield but not elsewhere in the discipline? If so, is there a sufficiently numerous population appropriately distributed to test the possibility? To demonstrate differential validity?

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[23] *Id.* at § 60–3.13.

[24] *Testing & Selection Order Guidance Memorandum No. 7a.*, n. 17 *supra*, "Questions & Answers" 1.

[25] *Id.* at 6.

[26] See Malbin, *Hiring Practices*, 5 NAT'L J. REPS. 1429, 1433 (1973).

[27] *Id.* at 1432.

One must ask what are the elements of the performance under evaluation. At the University of California, for example, faculty members are to be judged on the dimensions of teaching, scholarship, university service and public service. It is probably accurate to say these are classically regarded as analytically separable but, in practice, aspects of a single role. Thus, teaching feeds scholarship and scholarship teaching, while the professor's cultivation of his discipline equips him to contribute to the public interest at the intersections of scholarly inquiry and public debate or policy formation, and the need for reconciling the demands of professional autonomy with the imperatives of coordinating intricately overlapping and opposing activities and interests in a complex organization imposes a citizen's obligation of participation in governance.

No doubt, "scholarship" ranks well ahead of the other components of the faculty member's role. Even though scholarship is crucial to appointment and promotion, however, it receives different weight in relation to the remaining elements in different schools and departments and, additionally, falls subject to varying criteria in one unit as against another. It is not always clear in what exactly scholarly work consists, and the worth of most examples of this *genre* is proverbially vulnerable to challenge.

Why should not teaching rate higher in relation to scholarship? Many people believe it should. But, whatever its relative weight, how should it be judged? Teaching takes place in many settings and at a number of levels. These include lecture courses for large undergraduate classes, seminars for small groups of undergraduate or graduate students and supervision of a doctoral candidate's research. What is the value of one form of teaching as against another? It is not obvious how to rate a faculty member's performance in any of his teaching functions with sufficient precision to permit accurate and ready comparison with others. Nor is it always clear what point or points in time furnish appropriate moments for judgment.

University service and public service are rather cloudy notions. A conception of public service limited to something like that suggested above — intervention in some public forum on the basis of a scholar's expertise in his academic field — would strike many persons as much too restrictive. Some disciplines may lend themselves to public service more readily than others. A law professor, for example, may have more opportunities to contribute to the public interest, in some conventional understanding of the term, than a professor of Sanskrit. Their actual contributions, however, may stand in inverse relation to their opportunities. What significance attaches to considerations of this kind?

Many faculty members perform little or no service to the public or to the university. Some part of a faculty is made up of poor teachers, another fraction (including, unfortunately, a number of the same individuals), of very indifferent scholars. Many professors emphasize different aspects of the professor's role at different stages of their careers. It is understood that the role of the professor is an abstraction which will not accurately or fully describe the behavior of many professors. What is important is that the resource the university possesses in its faculty collectively supply the university's demands.

Of course, the requirement of a Ph.D. degree, where it exists, makes up only a part of the over-all selection process. For certain institutions, possession of the degree is not, in itself, qualifying. Selection of junior faculty is time-consuming and expensive. Many persons who hold the degree will not be considered at all, for to consider everyone would entail unacceptably heavy commitments of time, effort and expense. Academic employers may rely on various clues to eliminate many potential candidates, reducing the number given serious consideration to manageable proportions. Prominent among these are the institution (and department) granting the degree and endorsements of teachers respected in the field. Theoretically at least, such criteria are not purely arbitrary rationing devices. On the contrary, they function partly to focus attention at the institutions which attract the most able students, identify their academic qualities most accurately and provide the best training. Naturally, statements of this kind imply a lengthy series of debatable assumptions. They easily qualify as "unvalidated selection requirements." Choice among the persons who do become serious competitors for a position involves institutional judgments which would seem clearly to be procedures "other than tests." The objective is to predict which person will perform the role of professor so as to contribute most to the discharge of the faculty's collective obligation in the foreseeably likely mix of people, resources and responsibilities. In one case, capacity for productive scholarship may almost eclipse performance as a teacher; in another instance, teaching ability may count far more heavily. At times, competence in particular subfields may be decisive. In every case, judgments will be intuitive, discretionary, quite possibly arbitrary; they also may be informed or expert. They can hardly be validated according to the regulations, but such judgments may be indispensable to the conduct of the enterprise.

The regulations do provide an alternative to validation. The Testing and Selection Order provides that, "if the contractor is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination." [28] Examples of such conditions, it will be recalled, are "adverse effect" — *e.g.*, "a higher rate of rejection of minority candidates than of nonminority candidates for the same job or group of jobs" and "underutilization." It would seem that aggressive recruiting among women and minority groups might generate adverse effects at the same time that it produced equal employment opportunity — enlarging the scale of the recruiting effort gives assurance that no qualified minority or woman candidate has been overlooked but may operate to bring forward many unqualified minority and women applicants. More significantly, to refer to "underutilization" is simply to reenter the same circle travelled above in which underutilization depends upon availability and availability determinations require validated selection devices. At this point, it seems the themes developed in the regulations have reached a moment of denouement at which they all stand frozen on the stage awaiting the descent of some *deus ex machina*, which, however, the management has unfortunately neglected to provide. No one can tell whether equal employment opportunity is present or absent without satisfactory standards of merit, but the criteria of merit are cast in such a way that no one can say what it is or show who has it and who does not. It is understandable that in this setting affirmative action programs would be more negotiated than designed against a set of intelligible criteria.

The regulations fail to address the characteristics of faculty employment. Rather, it is insisted that faculty personnel standards conform to the regulations. Carried to its logical conclusion, this would imply: substitution of objective standards of appointment and promotion to foreclose the possibility of biased judgments, subdivision of the professorial role to facilitate application of objective standards and enlarge the pool of eligible candidates, strengthening of centralized administration to enforce adherence to required procedures for selecting academic staff. These tendencies conflict with academic traditions of peer review, decentralized authority and diffused responsibility and integration of functions — notably, research and teaching. It is precisely these traditions which are widely regarded as central to the academic enterprise. It seems unlikely that such a metamorphosis of butterfly into caterpillar will be seriously attempted. What seems more likely is that administration of the contract compliance program, left to itself, will veer ineffectually between de facto quotas and incipient breakdown, caught between the need to produce results and the inherent defects of the program's design.

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[28] 41 C.F.R. § 60-3.13 (1973).

REPORT IN SUPPORT OF RECOMMENDATION 75-3

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JUDICIAL REVIEW OF FEDERAL ADMINISTRATIVE ACTION: QUEST FOR THE OPTIMUM FORUM

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INTRODUCTION

A. *The Issue*

The aim of this Article is to explore the considerations that determine which federal administrative actions are best reviewed by the district courts, which by the courts of appeals,*** and which by separate courts of administrative review.

This study was commissioned jointly by the Administrative Conference of the United States, which has a continuing interest in questions respecting judicial review of agency action, and by the Commission on Revision of the Federal Court Appellate System, which is particularly concerned with the issue as it affects the circuit courts. That Commission, created in response to serious warnings that the courts of appeals are overloaded, has heard how the press of cases has led to heightened use of summary procedures and to the fear that the quality of decision may be impaired. While it is this concern that provides the immediate impetus for the present study, it would be a mistake to view the matter entirely from the standpoint of the courts of appeals. The overriding goal must be to afford adequate and efficient access to the courts generally. At the same time, the condition of all of the courts is a relevant factor in assessing the optimum system of judicial review: A review scheme that looks good on paper may be a disaster if overloaded dockets seriously impair the quality of adjudication.

In fiscal 1974, 1,994 of the 16,436 cases (12 percent) filed in the eleven circuit courts came directly from federal "Boards and Commissions" other than the Tax Court.[1] Moreover, in the same year the United States or its officers or agencies were parties to over half (7,334 of 13,491) of the cases appealed to the circuit courts from the district courts. Many of these were ordinary criminal cases. Even so, and setting aside proprietary and tax cases, it appears that several hundred administrative cases, perhaps nearly a thousand, reach the circuit courts annually through the district courts.[2] The number of such cases not appealed beyond the district courts is presumably a good deal higher.

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*** The United States Court of Appeals will be referred to, interchangeably, as "courts of appeals," "appeals courts," or "circuit courts"; the latter term, though not strictly correct, frequently serves the interests of brevity, euphony, or variety.

[1] 1974 REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF U.S. COURTS, table B3 [hereinafter cited as A.O. REPORT].

Dean Roger Cramton has identified three dimensions of any inquiry into what constitutes the optimum in institutions for the resolution of controversies: accuracy, efficiency and acceptability.[3] By accuracy is meant all those considerations that contribute to a high quality of decisionmaking: the qualifications of the deciders, adequate time for deliberation, and so forth. Efficiency reflects the truism that the conditions for quality decisionmaking are not without cost: It is also desirable to avoid undue delay, expense, or the extra litigation that may be prompted by fuzzy jurisdictional lines or by the uncertainty of substantive law. Acceptability embraces the principle that it is important that litigants feel they have been fairly treated. We shall bear these dimensions in mind in exploring the question of optimum forums for judicial review.

The result is no blueprint for change. If one concludes from this study, or from what we have overlooked, that changes are necessary, additional work will be required to flesh out the details.

B. *Patterns of Judicial Review*

At common law, relief against unlawful government action was sought in the ordinary courts of first instance. An injured citizen could file for one of the prerogative writs—chiefly mandamus, certiorari and habeas corpus—for an injunction (and later for declaratory judgment), or for damages in tort against the offending officer. A civil or criminal defendant might assert as a defense the invalidity of the regulation or other provision upon which the proceeding was based, and an offending officer could be prosecuted criminally.[4] In the federal courts, common law certiorari was essentially unavailable,[5] and, until recently, mandamus lay only in the District of Columbia.[6] Federal government action could be reviewed in state courts in criminal and damage proceedings,[7] and by way of defense, but state courts lacked authority to issue mandamus[8] or habeas corpus[9] against federal officers or, generally, to try federal offenses.[10]

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[2] *Id.*, table B7. The category of "other" U.S. defendant cases—which does not include government property, contracts, torts, or tax cases—numbered 690 in fiscal 1974. Social security cases (246) were separately categorized. Related questions are also presented in civil or criminal district court proceedings to enforce regulatory statutes.

Judge Leventhal has testified that appeals from district court rulings in review of administrative action "comprise almost all of the so-called 'U.S. Civil' cases component of the District of Columbia Circuit's workload," which in turn "is now running 32% of filings in 1974." He added: "[u]ndoubtedly, a disproportionate number of such filings are in the District of Columbia," despite the Mandamus and Venue Act of 1962, 28 U.S.C. §§ 1361, 1391(e) (1970). *Statement by Judge Leventhal Before Commission on Revision of the Federal Court Appellate System*, May 21, 1974, at 13-14 [hereinafter cited as *Statement of Judge Leventhal*].

[3] Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 Ad. L. Rev. 108, 111-13 (1964).

[4] *See, e.g.*, L. Jaffe, Judicial Control of Administrative Action 152-96 (1965); F. Goodnow, The Principles of the Administrative Law of the United States 378-411 (1905).

[5] Degge v. Hitchcock, 229 U.S. 162 (1913). *See* L. Jaffe, *supra* note 4, at 166-67.

[6] Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), and cases therein cited. *See generally* D. Currie, Federal Courts 541-42 (2d ed. 1975).

Judicial review reforms in the states, exemplified by the Model State Administrative Procedure Act, often retain the common law principle that administrative action is to be reviewed by the ordinary trial courts.[11] From the beginning of this century, however, Congress has frequently deviated from this model to provide for review by three-judge trial courts, by the courts of appeals generally, by a single court of appeals, or by a more or less specialized tribunal. The present statutory scheme is a patchwork of these various techniques.

I. District Court or Court of Appeals Review: Two-Tier or Single-Tier Structures

A. *Formal Administrative Action*

The Federal Trade Commission Act of 1914 set a pattern for many subsequent federal statutes in providing for both review and enforcement of Commission "orders" not in the trial courts but in the several courts of appeals.[12] Among other agencies whose orders bypass the district courts are the Power,[13] Communications,[14] Securities[15] and Maritime[16] Commissions, and the Labor[17] and Civil Aeronautics[18] Boards.

The rationale for the direct-review model, and its appropriateness for most, if not all, of the agencies to which it applies, are plain enough. The key point is that the district court is unnecessary here because the functions it ordinarily performs in the judicial system are either performed by the administrative agency itself or are relatively unimportant. First and foremost, a court trial need not be held because the record has already been developed at the administrative level in trial-type hearings conducted by administrative law judges in accordance with the Administrative Procedure Act (APA).[19] Second, a district court opinion defining and focusing the issues, frequently useful to the appellate court in other types of litigation, is superfluous because opinions by the administrative law judge or by the agency itself will already have served that purpose. Third, the availability of a convenient and relatively local point of entry into the judicial system, valuable to litigants of modest means in other civil cases, is of much less importance in many areas of administrative review where the economic stakes are typically high and the litigants well able to bear the costs. Finally, the vital screening role which courts of first instance play in holding down the volume of appellate litigation is, once again, played here by the administrative process. Only a small fraction of the cases processed by most agencies wind up in court, and a high proportion of those that do could be expected to reach courts of appeals even if required to pass en route through district courts. The efficiency argument is obvious: Assuming appeal as of right from district to appellate court,[20] bypassing the trial court significantly expedites ultimate decision,[21] lessening the burden on both courts and litigants.

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[7] United States *ex rel.* Drury v. Lewis, 200 U.S. 1 (1906); Teal v. Felton, 53 U.S. (12 How.) 284 (1851). Congress has increasingly allowed the defendant to remove to the federal court, *see* 28 U.S.C. § 1442 (1970) and predecessor statutes.

[8] M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821) (dicta).

[9] Tarble's Case, 80 U.S. (13 Wall.) 397 (1872).

[10] *See* Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1924); H. Friendly, Federal Jurisdiction: A General View 8 & n.28 (1973). State court jurisdiction to enjoin federal officers surprisingly remains unsettled even today despite the absence of federal jurisdiction in cases of low dollar value. *See* Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 Yale L.J. 1385 (1964); 28 U.S.C. § 1331 (1970).

[11] 9C Uniform Laws Annot. 174, 183 (1957), 134, 136, 158 (Supp. 1967). The Model Act in earlier or later form has been adopted in at least ten states. *See also* Ill. Rev. Stat. ch. 110, § 268 (1968).

[12] 38 Stat. 717, 719, § 5. The present statute is 15 U.S.C. § 45(c) (1970).

[13] 15 U.S.C. § 717r(b) (1970).

[14] 28 U.S.C. § 2342(1) (1970); 47 U.S.C. § 402 (1970).

[15] 15 U.S.C. § 78y (1970).

[16] 28 U.S.C. § 2342(3) (1970); 46 U.S.C. § 830 (1970).

[17] 29 U.S.C. § 160(e), (f) (1970).

[18] 49 U.S.C. § 1486 (1970), which also makes similar provision for orders of the Federal Aeronautics Administration (FAA).

Nevertheless, Congress has not invariably placed jurisdiction to review record agency adjudication in the circuit courts. Record review of applications for old age, survivors' or disability benefits under the social security law, for example, is channeled to the district courts by statute.[22] Until recently, the same was true of administrative workmen's compensation determinations under the Longshoremen's and Harborworkers' Compensation Act.[23] Similarly, in the absence of specific judicial review provisions, assorted other formal agency adjudications are afforded review in the district courts. The APA makes numerous agency actions reviewable in "a court of competent jurisdiction,"[24] and only the district courts enjoy grants of general jurisdiction in the first instance over mandamus actions[25] or actions arising under federal law.[26] Examples of district court record review under general jurisdictional provisions include dispositions of mining claims by the Department of the

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[19] 5 U.S.C. § 556 (1970).

[20] 28 U.S.C. § 1291 (1970).

[21] *See, e.g.*, H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914) (conference decision to substitute direct review of Federal Trade Commission (FTC) orders for the three-judge-district-court procedure passed by the Senate); H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961) (expedition was the express reason for extending the direct review procedure to deportation orders of the Immigration and Naturalization Service (INS)).

[22] 42 U.S.C. §§ 405(g), 421(d) (1970).

[23] 44 Stat. 1424, 1436 (1927). A 1972 amendment, 86 Stat. 1251, 1261, 33 U.S.C. § 921(c) (Supp. III 1973), provides for review by an administrative board and then by the circuit courts. The House Report gives no reason for the change. *See* notes 128-35 and accompanying text *infra*.

[24] 5 U.S.C. § 703 (1970).

[25] 28 U.S.C. § 1361 (1970).

[26] 28 U.S.C. § 1331 (1970) (subject to a troublesome $10,000 amount-in-controversy requirement).

Interior and of federal employee discharge cases by the Civil Service Commission; both have come under recent attack as time-consuming and out of line with the proper Trade Commission model. District court review, it is argued, "serves . . . no viable purpose."[27] The two-tier model assumes that, in some classes of federal agency litigation, district court review does perform a function important enough to justify the obvious cost and delay of an additional stage of litigation.

In the following analysis we shall examine the two models rather more closely, identifying and evaluating the comparative advantages of district and appellate courts as forums for record review of administrative action. We begin by asking, first, what would be gained and lost by district court review if there were no subsequent recourse other than to the Supreme Court on certiorari. We frame the discussion in this way not because we believe single-tier district court review a viable option, but because we can more easily isolate the relevant features of the two forums by viewing them independently rather than in coordination. Second, we compare the two-tier model to the single-tier alternatives, assuming a right of appeal to the circuit courts. Third, we add to the comparison a two-tier scheme in which appeals court review is available only on a discretionary basis. Finally, the general considerations which have been set forth are applied to specific agencies that might be thought borderline cases.

1. *Single-Tier District Court Review.* (a) *Appraisal of Advantages.* In a single-tier scheme, the district court would have three major advantages over the court of appeals as a forum for review of administrative action. The first is its greater proximity, convenience and, therefore, economy to the private litigant. Appellate courts sit in one or two cities in each circuit, district courts in many more; litigating close to home is presumably less costly. This advantage may be of little importance, as we have said, in big cases, especially when the agencies themselves are highly centralized. But for the social security claimant, the injured longshoreman, the discharged federal worker, access to

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[27] Polcover v. Secretary of the Treasury, 477 F.2d 1223, 1225-28 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1001 (1974) (employee discharge), and cases therein cited. *See also* Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 CORNELL L. REV. 178 (1972); Strauss, *Procedures of the Department of the Interior with Respect to Mining Claims on Public Lands* 170-71 (1973) (Report prepared for Administrative Conference of the United States, published in 1974 UTAH L. REV. 185, 266):

> Given a formal hearing process within the agency, the results of that process should have the consequences normally accorded agency hearings on-the-record: a review proceeding brought directly to the United States Court of Appeals in which the standard applied for review of factual issues is substantial evidence upon the record as a whole. District courts have no special expertise or function to warrant continuation of the present two-tiered structure for review; rather, they have seemed somewhat at sea, and far from uniform in their approach to review . . . .

In *Polcover*, for example, the time spent in the district court was twenty-seven months. 477 F.2d at 1227.

a convenient forum may be thought essential if the expense of litigation is not to swallow the recovery or price it beyond pursuit. "The obvious theory of a district court venue," wrote Professor Jaffe, "is that the typical plaintiff is a person of modest means."[28]

Yet the difference in litigation costs between district court and circuit court review should not be exaggerated. More than a third of all civil litigation in federal district courts is brought in cities where circuit courts also sit.[29] For this large category of litigants, the court of appeals is no more costly or inconvenient than the district court. Furthermore, many of those who must travel to a court of appeals must also travel, though less far, to a district court. The ninety-four federal judicial districts (including the Virgin Islands, Puerto Rico, Guam, and Canal Zone)—on the average, less than two per state—are not "local" in the way the county courthouse is. Finally, in the record review of agency action, a court of appeals, even when significantly more distant, is not a great deal more costly. A trial is not needed; witnesses need not be transported; added costs may be limited to a small difference in filing fees[30] and to the attorney's transportation, food and, perhaps, lodging costs plus travel-time compensation for the single day of oral argument,[31] if indeed there is one. The increasing use of summary procedures by courts of appeals[32] reduces the cost advantage of the district court, as it reduces the quality advantage of the appellate court. Thus, while it is incorrect to say that litigating in the circuit court "should cost no more,"[33] the saving is not on a grand scale; we guess it to be anywhere from zero to $600.[34]

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[28] L. Jaffe, *supra* note 4, at 158. It was on this ground that the Motor Carrier Lawyers Association, speaking for the small trucker, opposed (almost uniquely) the transfer of Interstate Commerce Commission review to the circuit courts. *See Hearing on H.R. 13927 Before House Comm. on Interstate & Foreign Commerce*, 90th Cong., 2d Sess. 32 (1968). In the Agricultural Adjustment Act, 7 U.S.C. § 1365 (1970), Congress carried this policy one step further, providing the farmer aggrieved by his assigned production quota with the additional option of a state court forum. *See Developments in the Law: Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 906 (1957). The same policy helped induce Congress in 1958 to forbid removal of state court workmen's compensation cases, 28 U.S.C. § 1445 (1970), and in 1962 to allow mandamus actions to be brought outside the District of Columbia, 28 U.S.C. §§ 1361 1391(e) (1970). *See* S. Rep. No. 1830, 85th Cong., 2d Sess. 6-10 (1958): S. Rep. No. 1992, 87th Cong., 2d Sess. 3 (1962).

[29] The data upon which this statement is based are found in 1974 A.O. Report, *supra* note 1, table C3.

[30] Filing fees are $15 in the district court, $50 in the circuit courts, see 28 U.S.C. § 1914 (1970); note following *id.* § 1913 (Supp. III 1973). This difference is not only small; it is also not immutable. Since the provision of the federal appellate rules that briefs may be produced "by any duplicating or copying process which produces a clear black image on white paper," Fed. R. App. P. 32, has been read, at least in the Seventh Circuit, to allow xerox copies of typed briefs, there seems no reason to expect a difference in printing costs. In any case, such a difference would argue for modifying the printing rules, not for dispensing with circuit court review if that appeared otherwise desirable.

[31] *See generally* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 606, 608 (1969).

[32] *See* note 52 *infra*.

[33] Johnson & Stoll, *supra* note 27, at 194 n.89 (1972).

[34] Round-trip coach fare on the less expensive days between Honolulu and Los

We must note, too, the possibility that district court review may be costlier and less convenient to the Government. Where an agency's cases are managed by United States Attorneys in the field, those stationed in cities where courts of appeals are located frequently acquire a special competence in handling litigation from a particular agency; to distribute that litigation among the district courts would force the Government either to assign cases to local federal attorneys who lack that expertise or to pay for circuit-riding by those who have it. Much the same applies to agencies that organize their attorneys on a regional basis more or less paralleling judicial circuits.[35] Expense to the Government, however, cannot alone justify denying private litigants a convenient forum within their means. If the district court were costlier to the Government than the circuit court to the private litigants, efficiency might dictate the latter as the forum, but fairness would require that the private parties be compensated for their travel time and expense.[36]

The second and more significant advantage of single-tier district court review is the conservation of judicial resources: the reduction, by two-thirds, of the number of judges required to decide each case. This does not mean a commensurate reduction in the number of judge-hours per case. A single district judge cannot handle as many cases in a given time as a three-judge appellate panel. Although the panel may perform some judicial tasks in triplicate, opinion-writing, the most onerous task of all, falls to only one judge per case. A recent time survey by the Third Circuit indicates that a judge spends roughly half (48 percent) of his case time writing opinions.[37] Half of the overall appellate effort would not be reduced at all by substituting single-judge review; the other half would be reduced by two-thirds; the overall saving of judge-hours would be one-third.[38]

A third advantage of the district court over the circuit court, going both to efficiency and to quality, is the greater flexibility with which it can be expanded to meet rising caseload demands. This flexibility flows from the fact

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Angeles is $253.33 (per United Air Lines information office, Sept. 20, 1974); flight time is long enough so that the attorney can probably expect to spend a full working day and a night in the process. If he charges for eight hours' travel time at $35 per hour, lives on the federal $40 per diem, and spends $20 for taxis, we add $340. We have disregarded the cost of traveling to Honolulu from a remote island to make connections, since that must be borne to reach the district court too.

[35] Those agencies which handle or supervise their own litigation from Washington, or which rely on the Civil Division of the Department of Justice, might have no strong preference in terms of cost, but could find it more difficult to maintain centralized supervision if forced to meet the district courts' shorter time periods for response.

[36] *See* Carrington, *supra* note 31, at 606, 608 n.277.

[37] Federal Judicial Center, 3d Circuit Time Study (November 16, 1972).

[38] An example may clarify: If a circuit court panel requires a total of 30 judge-hours to decide one case—15 for opinion-writing and 15 (as per the Third Circuit time study) for everything else—a single district judge would need only 20 hours—15 for opinion-writing and five for everything else. This reckoning ignores the time spent by appellate judges in conferring and in writing dissenting or concurring opinions; to that extent, it slightly understates the savings accomplished by district court review. According to the Third Circuit time study, *id.*, the latter functions consume 5.7 percent of the appellate judge's case time.

that district courts are not expected to maintain consistency among their own decisions. The appellate courts, on the other hand, strive not only to resolve conflicts of decision within and between districts but also to maintain harmony among their own decisions through en banc procedures that become both costly and awkward when too many judges are involved. The essential difference, as Judge Friendly has explained, is that the appellate courts are intended to be far more collegial.[39] In testimony before the Commission on Revision of the Federal Court Appellate System, judges have vigorously argued for limiting the courts of appeals to nine members, a number already equalled or exceeded in several circuits.[40] If we assume that these courts cannot be further enlarged, it becomes clear that, even if the basic cost of judge-time were the same at both levels, a given volume of cases could more seriously impair the quality of adjudication in the courts of appeals than in the district courts. This is not to say that enlargement of the district courts through the appointment of additional judges is altogether painless. The larger the court the more difficult it becomes to administer it efficiently and to preserve a semblance of uniformity in its rulings. But once a sufficient diversity of viewpoint and attitude is represented, additional judges are not likely to increase very much the risk of disuniformity or unequal justice. The fourth advantage of the district court is its superiority on occasions when, despite the existence of an administrative record, evidence must be taken. Sanctions for the violation of National Labor Relations Board (NLRB) orders, for example,[41] depend not only upon the validity of the order, which can be determined from the agency record, but also upon proof of its later violation, which was not in issue before the Board. Similarly, the propriety of interim relief against either an order or its violation pending judicial review[42] may depend upon facts respecting the balance of hardships that are outside the agency record.[43]

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[39] H. FRIENDLY, *supra* note 10, at 29-31, 40-46 (1973).

[40] *See Digest of Testimony Received by the Commission on Revision of the Federal Court Appellate System in Connection with Hearings Aug.–Sept. 1973* (Statements of Chief Judge Seitz on behalf of the Third Circuit judges; Statement of Judges Gewin, Morgan, Clark, Coleman, Godbold, Dyer, Simpson and Bell).

[41] 29 U.S.C. § 160(e) (1970).

[42] *See, e.g.*, 29 U.S.C. § 160(e), (f) (1970), authorizing temporary relief when review or enforcement is sought of an NLRB order. General authority of the same nature is conferred by the All Writs Act, 28 U.S.C. § 1651 (1970) ("all writs necessary or appropriate in aid of their respective jurisdictions").

[43] We do not view the erstwhile constitutional requirement of a judicial "trial de novo" of certain "jurisdictional" or "constitutional" facts found on the record by administrative agencies, *see, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932), as presenting additional occasions for evidence-taking in the circuit courts. This doctrine has been in serious decline in the last several decades, *see* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 156-61 (1958); Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 973 (1957). Moreover, if the requirement has any vitality at all, it seems likely it will be satisfied by a judicial redetermination of the facts on the basis of the agency record; *Crowell* itself spoke repeatedly of the need for an independent judicial "determination." The power to remand to permit additional evidence and the authority to ignore administrative findings seem fully to assure complete judicial control of any administrative proceeding. Congress seems to share our conclusion that no judicial trial is necessary under *Crowell*, for it recently transferred review of longshoremen's injury

Taking oral testimony in open court is a highly inefficient procedure for three judges;[44] if the incidental functions of enforcement and interim relief imposed the burden of conducting extensive trials in any substantial percentage of cases, the desirability of direct review would be questionable.

There may be no wholly satisfactory solution to the problem of incidental factfinding in contempt or interim-relief proceedings in courts of appeals. Sending these issues back to the agency[45] or to a master[46] can cause delay,[47] and the former gives rise to objections that the agency is made judge in its own cause.[48] Sending parties to the district court for interim relief[49] or to enforce orders reviewable in the court of appeals[50] splits what might be thought a single case between two forums, with varying risks of duplication, conflict, expense and delay.

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cases such as *Crowell* itself from the district courts to the courts of appeals. *See* note 23 *supra*.

[44] *See, e.g.*, NLRB v. Dell, 309 F.2d 867, 869 (5th Cir. 1962). On occasion the courts of appeals have themselves heard oral testimony. *E.g.*, NLRB v. Lambert, 250 F.2d 801 (5th Cir. 1958). *See also* NLRB v. Int'l Ladies Garment Workers Union, 36 CCH LAB. CAS. ¶ 65,365 (3d Cir. 1959) (granting temporary relief against a refusal to bargain upon finding irreparable harm on the basis of oral testimony, affidavits and argument).

[45] *See, e.g.*, NLRB v. Retail Clerks Int'l Ass'n, 203 F.2d 165 (9th Cir. 1953). *Cf.* ILL. ANN. STAT. ch. 110A, § 335(g) (Smith-Hurd Supp. 1974) (requiring prior application to the Pollution Control Board to stay its own orders); FED. R. APP. P. 8 (requiring prior application to a district court to stay its judgment or for interlocutory injunction).

[46] *See, e.g.*, NLRB v. Giannasca, 119 F.2d 756 (2d Cir. 1941); NLRB v. Little Rock Furniture Mfg. Co., 123 F.2d 868, 871 (8th Cir. 1941); NLRB v. Red Arrow Freight Lines, Inc., 193 F.2d 979 (5th Cir. 1952).

[47] *See* NLRB v. Giannasca, 119 F.2d 756, 759 (2d Cir. 1941) (Clark, J., concurring) (reference to master caused year's delay); Note, *The Role of Contempt Proceedings in Enforcing Orders of the NLRB*, 54 COLUM. L. REV. 603, 615 (1954) (two years for remand to Board in NLRB v. Retail Clerks Int'l Ass'n, 203 F.2d 165 (9th Cir. 1953); six years for master in NLRB v. Weirton Steel Co., 146 F.2d 144 (3d Cir. 1944)). Some time can be saved by directing the agency or master simply to take evidence and not find the facts; this procedure also helps to preserve the ultimate authority of the court by avoiding deference to a subordinate trier of fact.

[48] *See* Wallace Corp. v. NLRB, 159 F.2d 952 (4th Cir. 1947); *id.* at 957 (Soper, J., dissenting). It is not clear that the argument has more force here than when the agency enters the original order. *See* L. JAFFE, *supra* note 4, at 305-06 (1965). Having the facts as to violation determined by the expert agency reduces the risk of error or of conflict between agency and court as to the legality of the same conduct. *See* NLRB v. Giannasca, 119 F.2d 756, 759 (2d Cir. 1941) (Clark, J., concurring); Bartosic & Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors*, 39 U. CHI. L. REV. 255, 289 (1972); L. JAFFE, *supra* note 4, at 307-08.

[49] It is perhaps because of the awkwardness of appellate trials that, despite circuit review of final NLRB orders, the statute authorizes only the district courts to grant temporary injunctions against alleged unfair labor practices while the Board considers the merits, 29 U.S.C. § 160(j), (*l*) (1970). In the absence of a specific provision for district court relief before entry of a Board order, the Supreme Court has upheld interim relief by the circuit court under 28 U.S.C. § 1651 (1970), in order to protect its future jurisdiction. This procedure requires the circuit courts to find the facts for themselves although, in contrast to requests for interim relief after entry of a final order, the matter is not pendent to a review proceeding already properly in the appellate court.

[50] *E.g.*, ILL. ANN. STAT. ch. 111½, §§ 1041-42 (Smith-Hurd Supp. 1974) (Environmental Protection Act). FTC orders may be enforced either by district court action or, if they have been reviewed and ordered enforced, by a contempt proceeding in the circuit court. 15 U.S.C. § 45(c) (1970); *id.* § 45(*l*) (Supp. III, 1974); *see* United States v. Bostic, 335 F. Supp. 1312 (D.S.C. 1971) (district court); *In re* Holland Furnace Co., 341 F.2d 548 (7th Cir. 1965) (circuit court).

But one should keep the seriousness of the problem in perspective. The reported cases do not suggest that the courts of appeals are suffering greatly from the need to find facts in such proceedings. Given the time pressures surrounding applications for interim relief, we suspect the facts are normally presented by affidavits, which are no special problem for three judges to handle, or in a very brief and thus not terribly burdensome hearing. NLRB contempt cases, those in which the fact problem has been most prominently discussed, have been quite infrequent.[51] If the countervailing advantages of court of appeals review are considerable, the delays of an occasional remand or the dangers of bifurcated review may be an acceptable price to pay.

(b) *The Superior Characteristics of Courts of Appeals.* Against the greater economy and convenience of the district court forum must be weighed the great advantages of review in the courts of appeals: its capacity, or perceived capacity, for superior decisionmaking and its ability to develop and maintain a uniform and coherent case law for a large geographical area. The qualitative superiority, if it exists, can be attributed to three principal considerations. First, and by far the most important, is the multi-member composition of the appellate court. The process of collegial decisionmaking tends to counteract bias, subjectivity and incompetence. The need to persuade colleagues, and the opportunity to be persuaded by them, bring reason to the fore and subordinate considerations that cannot be defended in argument. Moreover, if one in three members of a district bench is inept, one in three cases will be decided ineptly; in a court of appeals, ineptitude would more often be outvoted. Besides, multi-judge review helps to minimize the extent to which litigative outcomes are determined by "the luck of the draw," the fortuities of judicial assignment. The decision of a panel of three judges chosen from a bench of nine is far likelier to be representative of the views of the whole court than a decision by one of twenty district judges. Nowhere is this value more important than in the review of certain types of administrative action, where outcomes so frequently reflect, in subtle ways, the philosophy and public policy preferences of the judge.

A second element of superiority is the supposed overall higher caliber of the appellate bench. Because of its greater rarity, superior authority, wider territorial jurisdiction, and consequent prestige, a seat on the appellate bench attracts men who would not accept a district judgeship. Furthermore, district judges are recruited almost exclusively from the ranks of the trial bar, whereas appellate judges are drawn from the profession as a whole and, at least in theory and to a considerable extent in practice, from the best of the district judges.

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[51] *See* Bartosic & Lanoff, *supra* note 48, at 256-58. Only 164 contempt cases had been brought as of 1971 for an average of five cases per year, with a high of 23 in all circuits in 1969.

Third, apart from the qualifications he brings to the bench, the appellate judge is better equipped by his judicial experience as a whole for the task of reviewing administrative action. Evaluating the decisions of other judges is his daily business. Trial judges, on the other hand, are more accustomed to exercising discretion, less accustomed to reviewing its exercise, less practiced in applying a standard of adjudication that requires them to defer and, therefore, more prone to substitute their judgment for that of the responsible administrative official. This contrast, we suspect, is somewhat overdrawn. District judges, though unaccustomed to passing upon prior judicial action, are regularly called upon to decide whether evidence is or would be sufficient to support a jury verdict, and the thought process required for that determination is not very different from that required in reviewing the findings of a lower court or an administrative agency. A more important difference, we think, is that a circuit court judge has greater opportunity than a district judge to familiarize himself with the substantive law of taxation, labor relations, securities regulations, and so on. One of thirty district judges in a circuit can expect to hear no more than 3 percent of the total caseload in any field; one of nine appellate judges will hear 33 percent of that caseload. It is no wonder that practitioners so frequently complain of the difficulty of making district judges understand the complexities of their particular specialty. A related difference is that appellate judges are more accustomed to deciding, and writing opinions on, questions of substantive law than district judges, who spend the greater part of their time conducting trials and ruling on procedural questions and who rarely write opinions of any great length.

A reservation must be entered, however. The quality advantage of the court of appeals, like the efficiency advantage of the district court, is weakened by the increasing practice of the former of deciding cases without oral argument or written opinion.[52] Indeed, where such summary procedures are used, it might well be argued that the advantage is reversed. A litigant, given a choice, might reasonably prefer to have his case decided by a single district judge who offered him an opportunity to be heard in person in support of or in opposition to a motion for summary judgment rather than by an appellate panel that denied that opportunity.

Whether or not the circuit court is in fact the superior forum, it is clear that most litigants, both private and governmental, believe it to be and would not readily accept the district court as a substitute. Indeed, it is fair to say that judicial review by a federal court of more than one judge has come to be looked upon as a matter of basic right in all cases, civil and criminal, administrative and nonadministrative. If the litigant who loses in a district court trial is entitled to review by a circuit court, would the loser before a mere administrative body settle for less? This sense of entitlement, whether or not justified, reinforces the objective considerations favoring appellate review.[53]

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[52] For a comprehensive description and analysis of the practice, *see* Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257. *See also* Bernard G. Segal, The Case for Preserving Oral Argument in the United States Courts of Appeals, speech to the American College of Trial Lawyers, March 19, 1974. In fiscal year 1972, of 12,455 cases decided (less consolidation), 3,918 (31.5 percent) were disposed of without oral argument or submission on briefs, 8,987 (72.2 percent) without signed opinion, and 4,995 (40.1 percent) without any written opinion. 1972 A.O. REPORT, *supra* note 1, table 12, at 104.

Another argument often made in favor of appellate review of administrative action is that it would be unseemly and demeaning for a single district judge to set aside the decisions of an expert administrative agency, especially one that itself is multi-membered. Nor is the point solely one of protocol: The risk of error is especially high when the judgment of one prevails over that of many. The argument from seemliness, however, applies less strongly to some agencies than to others. It applies full force to the great independent regulatory commissions whose members are appointed by the President with congressional approval and enjoy a secure, if limited, tenure. The element of indignity dwindles, however, when the agency is of lesser stature—for example, the Board of Immigration Appeals in the Department of Justice or the Appeals Council within the Department of Health, Education and Welfare (HEW), both quasi-judicial tribunals created and terminable by departmental regulations, and staffed by members appointed and removable at will by the respective heads of their departments; or even the Benefits Review Board in the Department of Labor, a statutory body, to be sure, but otherwise not very different from the other two.

Whether the superior decisionmaking ability of a three-judge tribunal would alone justify its added cost—and, in the case of the court of appeals, the reduction of collegiality brought about by the need for increased membership—is a complicated question. At the outset, it should be emphasized that the greater likelihood that an issue or controversy will be decided correctly by three heads than by one is not generally deemed a sufficient reason for committing it to three judges. Decision in the first instance is nearly always entrusted to a single judge, most of whose determinations (not only on questions of specific facts, but also on questions of inference, interpretation, discretion, remedy, and so on, are subject to narrowly limited review, assuring that the one judge will not be second-guessed by the three unless he goes egregiously wrong. Moreover, the use of multi-judge panels for the review of district court decisions in ordinary civil and criminal litigation does not necessarily imply a societal judgment that correction of egregious error is a more important or demanding function than initial decision, or so important or demanding as to justify the additional costs of multiple judges. The plurality of appellate judges can be sufficiently explained by two other factors: the unseemliness of letting a single judge undo the work of another; and their responsibility not only to correct error in the particular case, but, more importantly, to maintain a coherent body of law over a broad geographic area—a duty which does justify, and perhaps demand, a premium brand of adjudication.

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[53] The litigants' preference for a multi-judge forum, however, cannot be decisive so long as the added costs of such first-class justice are not borne by the litigants themselves through fully compensatory user fees. Of course, a party prefers a better tribunal if he can get it for nothing. If they had to pay their way, many consumers of judicial services, at least in some types of litigation, might well opt for the small economy size.

Whether the correction of egregious error would alone justify the costs of multi-judge review may well vary according to the nature of the case. First, the greater the significance of the matter to be decided, the more resources society may be justified in spending in an effort to decide it correctly. An investment of judicial time that might seem indispensable in passing upon Power Commission rates for a whole new gas field, for example, might appear an inexcusable luxury in determining the ownership of a bicycle. Similarly, the difficulty of the case may be relevant to the appropriate investment of judicial resources. The advantages of a highly qualified, multiple-judge panel may be especially important in cases where the technical difficulty of the questions enhances the risk of error.

The importance one attaches to the advantages of a multi-judge court for the correction of error will take on significance when we evaluate two-tier review. But for purposes of comparing systems of single-tier review, the decisive advantage of the court of appeals is its capacity to develop and maintain a coherent, reliable and uniform case law for a fairly large geographical region. As suggested earlier, the importance of correctly deciding legal issues that transcend the particular case argues strongly in favor of providing a first-class forum. Moreover, apart from the quality of decision, the very freedom from cumbersome en banc procedures that gives the district courts significant advantages in terms of ability to accept additional workloads disables them, whether their judges sit singly or in threes, from performing the lawmaking function. As courts of first instance, those in heavily populated areas inevitably have large caseloads which necessitate too many judges to be able to achieve even district-wide, let alone circuit-wide, uniformity. At best, single-tier district court review would settle legal issues one district at a time, leaving the law uncertain elsewhere in the circuit and promoting litigation. At worst, it would generate a host of inconsistent decisions within and between districts, unresolvable short of the Supreme Court, which has difficulty finding time even to iron out conflicts among eleven circuit courts. It would be bad enough that interdistrict conflicts would result in unequal treatment of parties similarly situated. It would be intolerable that conflicts within a single district would make it impossible to determine the legality of conduct at the all-important planning stage. Single-tier district court review is, therefore, simply unthinkable; only the court of appeals, with its broad territorial jurisdiction and with judges few enough to keep in step with one another, can maintain a tolerable degree of uniformity.

The advantages of the district court—convenience, judicial economy and flexible membership—are all possible only because we do not look to it for uniformity. It is the need for uniformity of decision over a wide geographic area that prevents the circuit courts from becoming conveniently "local" forums and, by placing a ceiling upon their membership, makes them vulnerable to caseload pressures that threaten the quality of adjudication. And it is also the need for uniformity (along with desire for quality and fear of unseemliness) that accounts for the use of expensive multi-member panels; deciding singly, appellate judges would generate too many conflicts for feasible resolution en banc. In sum, the achievement of uniformity carries a price tag, but clearly an acceptable one.

2. *Mandatory Two-Tier Review: Appeal as of Right.* Having assessed the relative advantages of circuit court and district court review on the assumption that each were to be terminal, subject to Supreme Court certiorari, we can now move to the more practical comparison between direct court of appeals review and a two-tier system in which district court orders are appealable, either as of right or with leave, to the circuit courts. First, we shall examine "mandatory two-tier review" (appeal as of right); in the following section, we shall add "discretionary two-tier review" (leave to appeal) to the comparison.

(a) *Two-Tier or Direct Court of Appeals Review.* The critical advantage of mandatory two-tier review over single-tier district court review is that it provides a mechanism for the resolution of inconsistencies within and between districts and for the achievement of circuit-wide uniformity. This benefit is not without considerable cost in those cases where appeals are taken, but the price is undoubtedly worth paying in order to avoid the intolerable discordance and uncertainty that would result, in nearly all areas of administrative review, if there were no recourse beyond the district court.

The more difficult problem is to justify mandatory two-tier review as against direct circuit court review. In every case eventually appealed to the circuit courts, interposition of the district court substantially increases the cost of litigation and delays the resolution of the controversy. These costs are difficult to quantify with any confidence. The litigant must pay double filing fees and brief reproduction costs, and must transport his attorney to two courts instead of to one. He must also pay for extra work by his lawyers (though presumably much less effort is required to prepare for a second appeal on essentially the same questions). The indirect costs of the added delay, both to the particular parties and to the system, are more elusive. Delay may induce parties to settle on terms less just than would be imposed by a court decision;

it may cause deterioration of evidence that must be used if there is a retrial; similar cases may have to be litigated until the disputed point of law is settled; it also increases the harm done by a challenged practice or by its temporary restraint during the period of litigation.[54]

Nor are the disadvantages of two-tier review limited to those cases in which appeals are taken. Perhaps the most unfortunate consequence of adding the district court stage is that it prices the appeals court beyond the reach of many litigants. The party who loses in the district court may stop at that point, not because he is satisfied or even resigned, but because he is exhausted. When that occurs, the objection is not only that the exhausted litigant has been denied access to a superior forum, as under a single-tier district court system, but that he has effectively been excluded from a superior forum that is available to more affluent litigants. Further, if the cost of another appeal is sufficiently great in comparison to the stakes in an entire class of cases, interposing the district court could create substantial disuniformity.

Four countervailing advantages might be claimed for two-tier review, three of them carrying little weight. First, whereas in other areas of litigation an appellate court can profit greatly from a lower court opinion focusing the issues, weighing the opposing arguments and pinpointing relevant portions of the record, that advantage is minimal in the review of on-the-record administrative action, where even without a district court opinion, the court of appeals has the benefit of at least one, and often two, formal opinions below—by an administrative law judge and by the agency head (or heads). The district court, we might add, is in no better position than the appeals court to evaluate the administrative record and findings; it applies exactly the same standard of review, and performs an essentially duplicative function.[55] Second, the district court, as we have already observed, is closer and cheaper; sometimes that may matter. If there are some for whom two-tier review prices the appeals court beyond reach, there may be others for whom the alternative approach prices judicial review itself beyond reach. Others, though able to afford the appeals court, might nevertheless prefer the cheaper forum, and doubtless many more would if required to bear the full cost of multi-judge adjudication.[56] But since, as suggested above, the added costs of court of appeals review are apt to be slight and, in any event, the litigant will find his district court triumph cheaper only if the Government chooses not to appeal it, we do not think district court convenience a weighty argument. Third, while initial district court review of record agency decisions would admittedly eliminate factfinding difficulties incident to circuit court enforcement or interim relief, we cannot believe, for reasons indicated above,[57] that these occasional difficulties are serious enough to justify the resulting waste of resources and the impaired quality of adjudication.

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[54] On the evils of delay, *see* H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURTS (1959). *See also* Carrington, *supra* note 31, at 554.

[55] Polcover v. Secretary of Treasury, 477 F.2d 1223, 1226-27 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1001 (1974). *But see* Nickol v. United States, 501 F.2d 1389, 1391 (10th Cir. 1974).

[56] *See* note 53 and accompanying text *supra*.

The only really important justification for two-tier review is the possibility that a great many cases will not be appealed beyond the district court and the appellate courts will be relieved of a significant part of their workload. Just how low the appeal rate (the percentage of district court decisions appealed to the circuit courts) must be in order to make two-tier review worthwhile is difficult to say. More could be said if the sole objective were to minimize the amount of judge-time required for the review of formal administrative action. Earlier we estimated that a court of appeals decision might require about three judge-hours for every two required by a district court decision. On that assumption, a 10 percent appeal rate would yield a reduction of more than 20 percent in overall expenditure of judge time, and a rate of about 30 percent would be the "break-even" level at which the amount of district-judge-time exactly equalled the reduction in appellate-judge-time.[58]

The number of judge-hours required for the review of an administrative action is not, however, the only appropriate measure of judicial efficiency for our purposes; accordingly, a favorable appeal rate may not be a necessary condition for the adoption of two-tier review. We have already seen that the courts of appeals are a scarce resource, less easily expanded than the district courts; hence, a measure that reduces the pressure on them might be justified, even though the overall demands upon the judicial system as a whole were thereby increased, if the alternative seriously impaired the collegial nature of the appeals courts. Thus, even if the appeal rate were much higher than the break-even level, the absolute number of cases filtered out of the circuit courts might still be great enough to justify a more-than-equal increase in judge-time at the district court level.

We need hardly add that a low appeal rate, if not a necessary condition for two-tier review, is also not a sufficient condition. The very considerable disadvantages in terms of cost and delay to some litigants, and effective denial of court of appeals review to others, must be carefully weighed against any savings to the judicial system, and these savings must be substantial. An analogy may help to put the issue in perspective. Routing review of record administrative action initially to the district court has much the same advantages and disadvantages as the insertion of a new single-judge court between district court and circuit court in ordinary civil and criminal cases, which we doubt many would find desirable.[59] The comparison may suggest that two-tier administrative review, even in the less important cases, ought to be viewed not as an ideal but as a possibly unavoidable evil.

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[57] *See* notes 41-51 and accompanying text *supra*.

[58] Using the estimated ratio between district judge and circuit court time (2:3) developed at note 38 and accompanying text *supra*, a single district judge would invest 10 units of judge time in deciding 10 cases; if there were direct review three circuit judges would invest 15. Appeal in one case in 10 would add one and a half more units (diminished to the extent that the appellate court relies upon the opinion below); appeal in three in 10 would add four and a half. These crude estimates are meant merely to be suggestive; any proposal for legislative action or inaction should be supported by statistical information expertly collected and expertly analyzed.

The relevant search, then, is to identify readily definable categories of administrative cases whose diversion to the district courts in the first instance would spare courts of appeals a burden of decision that threatens their ability to function as collegial bodies, or, less compellingly, that is not worth their time. In any event, in order to minimize the countervailing costs, two-tier review should be applied first to those categories of cases generally simple or trivial enough to be least deserving of the effort of three judges.[60]

3. *Discretionary Two-Tier Review: Appeal by Leave.* We have thus far assumed that appellate court review, whether direct or indirect, would be available as a matter of right. The alternative, a two-tier system in which leave to appeal from district court decisions would be granted or denied by the court of appeals on a discretionary basis, deserves investigation.

A proposal to this effect was made by Judge Friendly in his Carpentier lectures:

> [W]here review of administrative action lies in the district court and that court has affirmed, appeal should be only by leave of the court of appeals. The argument would be that it is enough to grant an aggrieved citizen one judicial look at the action of a disinterested governmental agency, unless a superior judicial body believes the case presents a problem going beyond a particular instance.[61]

Under Judge Friendly's proposal, district court decisions adverse to the administrative agency would continue to be reviewable as of right; only for the private litigant would review be conditional. Arguably, such a scheme would meet the crux of the objection that it is unseemly for a single judge to reverse with finality the decision of a high-status multi-member board. The unseemliness, perhaps, lies not in district court review per se but merely in giving a district court final say when it reverses an agency. The very considerations—

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[59] On this possibility, *see* H. FRIENDLY, *supra* note 10, at 430: "One regards with horror what might be considered still another tier of courts, with the attendant delay and expense."

[60] Case-by-case determination of the appropriate forum would make for maximum precision at the cost of a considerable sifting burden and delay; we would not recommend it. A jurisdictional-amount requirement for direct review would help to strain out cases of little immediate significance, but would inhibit ultimate court of appeals resolution of the important legal questions that may often arise in the smallest cases. Moreover, despite years of precedents, such a requirement might result in wasteful jurisdictional litigation, and administrative decisions concerning such matters as deportation or union election do not lend themselves to ready translation into money equivalents. *See generally* D. CURRIE, *supra* note 6, at 504-43. Thus, even though the present statutory practice of prescribing the reviewing forum according to easily administrable categories bears only a rough correspondence to the relevant policies, we think it the most promising approach.

[61] H. FRIENDLY, *supra* note 10, at 176.

the expertise, stature and multiple membership of the agency—that weigh against finality for the district court when court and agency disagree, arguably weigh in favor of finality when court and agency concur. Equality of access between litigants, needless to say, cuts against any such distinction and would argue for putting both parties to the hazard of discretionary review.

Another important variable is the standard to be used in accepting or rejecting cases. At one extreme, leave to appeal might be granted only in cases involving important issues of law, or intracircuit conflicts, or, possibly, large immediate stakes. At the other pole, all but patently frivolous appeals might be accepted. An intermediate approach would grant review not only in the important cases but also in cases of patent error below.

(a) *Appraisal of Advantages.* The advantages of mandatory two-tier review over direct review in the courts of appeals, it will be remembered, depend upon the expectation that losing parties in the district court will often decide not to take a further appeal. Discretionary two-tier review allows us to increase those advantages by artificially depressing the rate of appeal. Thus, in a field where the high frequency of expected appeals would obviate any substantial economies from mandatory two-tier review, making appeals discretionary might make interposition of the district court worthwhile. Similarly, in fields where mandatory two-tier review does produce significant economies, there may still be a substantial burden on the courts of appeals that discretionary review could further lessen.

Discretionary review, however, would require in every appealed case a determination now required in none: whether to grant or deny leave to appeal. The added burden of this preliminary screening must be weighed against whatever savings might be gained through obviating a decision on the merits in those cases where leave to appeal is either not requested or is denied. Those savings are, in turn, suspect in view of the increasing tendency of appellate courts to decide "easy" cases by summary procedures that dispense with formal opinion and oral argument. If leave to appeal were denied only in patently unmeritorious cases, the number of applications for review would not be greatly reduced; a high proportion of them would be granted; and nothing would be gained even in leave-denied cases, since nearly every such case would be one which, on the merits, would be decided summarily, and since the decision whether to grant or deny leave would involve virtually the same judicial thought process as the decision on the merits. If, on the other hand, leave were granted only in cases presenting an important issue of law, and were rigorously denied even in potentially meritorious cases not presenting such an issue, the savings could be more substantial. Fewer applications for leave would be filed; fewer of them would be granted; fewer of those denied would, if decided on the merits, be dealt with by summary procedures; and the thought process in deciding whether to grant or deny leave would be more abbreviated than that required for decision, even summary decision, of the merits. Fishing through 4,000 annual certiorari petitions may be a whale of a job for the Supreme Court, but it is surely paltry in comparison to deciding all those cases on the merits.

There are some who would prefer discretionary review to wholesale use of summary decision procedures, even if it were not more efficient. Their position is that oral argument is often an essential input, even in cases that at first may appear open-and-shut; that an opinion setting forth reasons is an obligation of the judicial office; and that a decision dispensing with both is no proper decision at all. Rather than pretending to decide the merits and, in the process, elevating an unreviewed district court decision to the status of a circuit precedent binding on other district judges, the court of appeals should, like the Supreme Court, simply decline to review—an action supposedly having no precedential importance. If the courts of appeals behaved as if appeals were discretionary, surely it would be preferable to legalize and properly label what they are doing. But it is not wholly true that the appeals courts are treating review as discretionary; a cursory review of the merits is better for the parties than no review at all. The significant argument for discretionary review, for our purposes, is judicial economy.

(b) *Appraisal of Disadvantages.* The disadvantages of discretionary review are immediately obvious and weighty. To a greater degree than with mandatory two-tier review, the appeals court would be removed as a forum for the correction of error and bias. In every run-of-the-mill case, a lone district judge would have final say. It is serious enough to exclude litigants from the superior forum by raising the price of admission; it is more so, especially in the important sense of appearances, to refuse admission at any price. The agencies themselves, assuming they, too, had no automatic right to review, might be persuaded to live with such an arrangement if satisfied that the circuit courts would be open to them in the cases that really mattered. For the ordinary private litigant, however, to whom the "routine" case is anything but routine, denial of recourse beyond the district court might be harder to swallow, especially if it were denied (as it would have to be) only to a very few classes of litigants.

Discretionary two-tier review also has the further disadvantage of added cost and delay for litigants. However much or little it may conserve the resources of the judicial system, discretionary review would do nothing to conserve the resources of the parties. If the screening procedure used by the courts of appeals were modeled on the Supreme Court's certiorari procedure, the appellant would have to file not one but two briefs—first, a petition for review arguing the "certworthiness" of the case, and, if that were successful, a full brief on the merits. The price of admission to the court of appeals would thus be significantly increased. It is possible that the appeals courts would not choose to pattern their screen on Supreme Court certiorari; instead, they might simply require a single brief presenting both reasons for granting leave and the merits. If so, legal fees would not be appreciably different than under mandatory review, but petitioners denied leave would get much less for their money.

The cost factor, however, is probably less important than the factor of delay. The discretionary approach, by sandwiching an additional stage of decision between district court and plenary appellate review, would inevitably prolong the process of judicial review of the particular agency action involved. To be sure, the delay would be mitigated in part by the time saved through reduction of the appellate courts' on-the-merits caseload. And for litigants generally, the process of judicial review would be shortened, not prolonged: that follows from our assumption that discretionary review would result in an overall net saving of time for the courts of appeals. But while the benefits thus obtained would be shared by all circuit court litigants, the burden of delay would be borne exclusively by litigants in the particular categories to which the leave-to-appeal procedure was applied. Members of that class would be worse off, and could fairly claim discrimination, whether denied appellate court review or merely forced to wait longer and pay more for it than others.

In short, for the appellant who is denied leave or discouraged from seeking it, discretionary two-tier review has nearly the same disadvantages as single-tier district court review. From the standpoint of the system as a whole, however, the overriding flaw of single-tier district court review is absent, for discretionary access to a court of appeals may be sufficient to settle questions of law and to resolve intracircuit conflicts.

On the strength of this analysis, we conclude that agency action is unsuitable for discretionary two-tier review unless two conditions are met. First, the volume of appeals must be large and burdensome, even after filtration through the district courts: otherwise, curtailment of the right to appellate review would not be worth the candle.[62] Second, the proportion of those appeals involving legal issues or important interests must be very small; otherwise, leave to appeal would be granted too often to achieve real savings. Moreover, even if both conditions are satisfied, the need must be very great indeed to justify outright denial of appellate court review, if there is any reason to believe that the decisions of district courts would systematically differ from those that would be reached by circuit courts; that is, that denial of automatic review would be outcome-determinative in any substantial number of cases. A high reversal figure indicates that district courts in this field are more than ordinarily prone to error or bias and, therefore, that circuit court review serves an especially significant error-correcting function. In particular, it would be unfortunate to deny private litigants challenging governmental action access to appellate courts in categories of cases in which the district courts are, in general, less sympathetic forums.

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[62] The discretionary approach would be appropriate, however, where two or more agencies, each generating a relatively small caseload, are combined for review purposes, producing a large aggregate caseload. Indeed, the more agencies subjected to this approach, the less basis there is for the objection that a particular class of litigants has been singled out.

4. *Specific Agencies.* (a) *Social Security Administration.* (1) *Current Practice: Mandatory Two-Tier Review.* A natural testing ground for these generalizations is the Social Security Administration (SSA), a subdivision of HEW, which appears at the present to be the most significant instance of a federal agency whose adjudications on a formal administrative record are reviewable in the district courts in the first instance.[63] In fiscal year 1974, 3,585 social security cases were filed in the district courts,[64] yet only 246 district court decisions were appealed to the circuit courts.[65] If one looks at a slightly longer period, and assumes a one-year lag[66] between the two stages of review, the appeals rate seems to be about 10 percent,[67] roughly the same as that for district court cases generally.[68] About 80 percent of the social security cases involve claims for disability benefits; the balance involve claims for health insurance, retirement and survivors' benefits.

That the appeal rate is not higher is due in part to the Government's own policy of restraint in challenging adverse decisions. From the inception of the disability insurance program in 1955, through 1973, the Government appealed only 102 district court reversals, barely 5 percent of the total.[69] Its policy is to appeal only if the case appears to have serious administrative implications—that is, is contrary to statute, regulations, or administrative practices and might have a precedential effect on future cases; mere error in the application of the "substantial evidence" standard of review will not be challenged.[70]

Disability claimants, too, have tended to settle for a single round of review, appealing only 12 percent of all district court defeats since the program

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[63] 42 U.S.C. § 405(g) (1970).

[64] 1974 A.O. Report, *supra* note 1, table C2.

[65] *Id.*, table B7.

[66] The median time interval from filing to disposition in district court social security cases is 10 months. 1973 A.O. Report, *supra* note 1, table C5A.

[67] Social Security Administration Cases, 1970-74

Fiscal year	*district court*	*court of appeals*
1970	1,735	—
1971	1,792	—
1972	2,288	210
1973	2,497	193
1974	3,585	246

1972-74 A.O. Report, *supra* note 1, tables B7 and C2. Assuming a one-year lag between district and circuit filings in the case, the 649 appeals in the last three years are ten percent of the district court cases filed in 1971-73.

[68] *See* 1973-74 A.O. Report, *supra* note 1, tables B3 and C2.

[69] Staff of House Ways and Means Comm., 93d Cong., 2d Sess., Report on the Disability Insurance Program 262 (Comm. Print 1974) [hereinafter cited as Committee Staff Report].

[70] *Id.* at 266.

began.[71] The explanation probably lies in a combination of factors—the exhaustion of the litigant's resources, a recognition that the stakes do not justify a second round of litigation costs, and a realistic appreciation of the odds against success.[72] Attorneys, many of whom take disability cases on a contingency basis in the hope of earning the "reasonable fee" provided for by statute,[73] may be willing to gamble on a single appearance before a familiar district judge but not to risk further time and money on a long-shot try in a more distant forum.

(2) *Appraisal of Direct Court of Appeals Review.* Even on the basis of present figures, cited above, one can see that direct review of social security cases would bring a major increase in the appellate caseload. If every case now brought to district court were brought to a court of appeals—and presumably most would be, since the added costs of the latter are likely to be trivial[74]—the increase would be on the order of 20 percent of the total present caseload of all circuit courts, nearly tripling the present number of direct administrative review cases.[75] But the present figures do not begin to suggest the expected magnitude of the social security caseload problem in the very near future. In the seven-year fiscal period 1967-73, social security filings in the district courts more than doubled.[76] In fiscal 1974, they rose by another 48 percent as the first black lung benefit cases came to the courts under the Coal Mines Health and Safety Act of 1969.[77] Black lung litigation is expected to increase dramatically in the next two years, and then, so far as SSA is concerned, to drop off as that agency ceases to be responsible for the program.[78] In the long run, a much more prolific source of litigation will be the Supplemental Security Income Program,[79] which as of January 1, 1974, provides for a federally guaranteed monthly income to replace the former state programs of aid to the aged, blind and disabled. Claims under this statute are already moving through the multi-tiered processes of the SSA in about half the volume of the regular disability claims[80] and are expected to equal that volume. The first wave of these cases has not yet broken upon the district courts, but it has been estimated that by 1976 district court filings in the combined disability programs

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[71] *Id.* at 269-70.

[72] More than 80 percent of all disability appeals have been decided in the Government's favor by the courts of appeals. *Id.* at 270.

[73] 42 U.S.C. § 406(b) (1970) (not to exceed 25 percent of past-due benefits).

[74] *See* notes 29-36 and accompanying text *supra.*

[75] *See* notes 1-2 and accompanying text *supra.*

[76] 1967-73 A.O. REPORT, *supra* note 1, table C2.

[77] 30 U.S.C. § 801 (Supp. II, 1972).

[78] Under the Coal Mines Health and Safety Act, black lung claims filed prior to January 1, 1974 are administered by HEW; claims subsequent to that date are filed pursuant to applicable state workmen's compensation laws certified by the Secretary of HEW as having adequate coverage, or absent such certification, are administered by the Department of Labor under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. 30 U.S.C. §§ 924, 931-32 (Supp. III, 1973).

[79] 42 U.S.C. § 1381 (Supp. II, 1972).

[80] COMMITTEE STAFF REPORT, *supra* note 69, at 164.

will have reached the staggering total of 10,000 per year, nearly ten percent of total civil filings in fiscal year 1974.[81] Nor is the burden of this caseload evenly distributed throughout the judicial system. In fiscal 1974, about 20 percent of all social security cases were filed in three judicial districts (Eastern Kentucky, South Carolina and Puerto Rico), and nearly 40 percent in eight districts, mostly in the Fourth, Fifth and Sixth Circuits and specifically in the Appalachian region.[82]

The impact of these new programs has not yet been felt by the circuit courts—yet even without them social security appeals have doubled since 1970.[83] If the 10,000-case projection for the district courts comes true, and if the historic 10 percent appeal rate holds, the courts of appeals will be receiving upwards of 1,000 social security appeals within four years, nearly 70 percent of them in the Fourth, Fifth and Sixth Circuits.[84]

In view of these developments, it would be manifest folly to institute direct circuit court review. Indeed, this would be true even if the appeal rate were many times greater than it is. Two-tier review means greater expense and delay for those litigants who persevere to the appellate stage but lesser expense to the 90 percent who do not. And while many of those who accept the verdict of the district court do so because they cannot afford to go further, this consideration seems decisively outweighed by the saving—one is tempted to say salvation—to the judicial system through avoidance of what might conceivably be a 30 percent increase in the appellate court caseload.[85]

(3) *Appraisal of Discretionary Two-Tier Review.* The more difficult question is whether court of appeals review ought not be made discretionary in social security cases. The conditions outlined earlier seem fairly well satisfied. Although the present volume of appeals would not justify such a departure from the tradition of appellate review as of right, the projected volume, especially if concentrated in three circuits, could well have a discernible effect on the quality of adjudication.[86]

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[81] *Id.* at 4.

[82] 1974 A.O. REPORT, *supra* note 1, table C3.

[83] *See* note 67 *supra.*

[84] *See* COMMITTEE STAFF REPORT, *supra* note 69, at 270.

[85] *See* notes 1-2 and accompanying text *supra.*

[86] An alternative possibility would be to expand the number of circuits so as to provide additional manpower without impairing the ability of individual courts to maintain a uniform law of the circuit. Every such mitosis, it may be objected, reduces geographical diversity, enhances the power of individual Senators over the appointment process, and increases the risk of intercircuit conflicts that the Supreme Court may be too busy to resolve. *See, e.g.,* H. FRIENDLY, *supra* note 10, at 39-41; Carrington, *supra* note 31, at 580-87. We share Judge Friendly's reservations as to the extent to which additional circuits would mean additional conflicts. If eleven courts agree on an issue, the chance that a twelfth or even a twentieth will disagree seems remote indeed. The problem of single-Senator dominance of a one-state circuit could be met in the New York City area, for example, by drawing circuits that would include portions of New Jersey and/or Connecticut as well as of New York. Splitting a state between circuits has its problems, but it has already been formally proposed for California by the Commission on Revision of the Federal Court Appellate System, and an extensive argument has been

The second condition—that relatively few appeals would be allowed under a discretionary procedure—is also probably met. It is plain that a high proportion of all social security cases involve purely evidentiary issues. More pertinent, and less clear, is whether the same can be said about the much smaller subclass of cases in which appeals are now taken. Since the Government appeals only 5 percent of its district court reversals and selects those on the same criteria that circuit courts would use in granting leave, discretionary review would not substantially weed out this class of appeals. Private litigants, however, who appeal more than twice as often, use less stringent criteria; one assumes that their contribution to the circuit court caseload would probably be materially reduced by a discretionary filter.

The third consideration—that the substitution of discretionary for mandatory review should have no systematic effect on the outcome of litigation—presents a more difficult question. The Government's petitions for review will, in the main, be granted; those we can ignore. The question is whether discretionary review would deprive social security claimants of a forum generally more favorable to them than the district courts. The answer is probably not but depends to some extent on how one evaluates certain figures. If one ignores remands and technical dismissals, more than four out of five disability appeals are decided in the Government's favor in the circuit courts. But counting remands as losses—not unreasonable since seven of every eight appeals are by the claimant—the Government's batting average falls to a less reassuring 67 percent.[87] In any case, there is solid evidence that district court review is no mere rubber stamp. Prior to 1968, the SSA's record in the district courts was notably unimpressive, a majority of cases ending either in reversals or remands.[88] Since that time, it has fared somewhat better, partly because of a 1968 statutory amendment tightening the definition of disability[89] and partly

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made that the problems of a split state are not very serious. *See* Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188 (1974). To develop fully the disadvantages of dividing the circuits and to compare them with those of the present social security pattern is beyond the scope of this study.

[87] COMMITTEE STAFF REPORT, *supra* note 69, at 270.

[88] In 1965, two district judges observed that in a several-month period in 1965, the SSA had been either reversed or remanded in 63 (according to one) or 75 percent (according to the other) of the cases. Scott v. Celebrezze, 241 F. Supp. 733, 736 (S.D.N.Y. 1965); Seldomridge v. Celebrezze, 238 F. Supp. 610-20 (E.D. Pa. 1965). Unpublished figures compiled by SSA show that in the fiscal year period 1965-67, the Secretary was affirmed in 48 percent of all social security cases, reversed in 26 percent, and remanded in 26 percent. SOCIAL SECURITY ADMINISTRATION, DEP'T OF HEALTH, EDUCATION, AND WELFARE, OPERATIONAL ANALYSIS OF THE BUREAU OF HEARINGS AND APPEALS 31 (June 30, 1973) [hereinafter cited as HEW, OPERATIONAL ANALYSIS]. Published figures, unfortunately, do not record the number of remands. They show that in disability cases in which the Secretary's decision was either affirmed or reversed, the affirmance rate in the period 1955-67 was 66 percent; and that if total dispositions are deemed to include affirmances, reversals and cases in which benefits were allowed after court remands, the affirmance rate was 48 percent. COMMITTEE STAFF REPORT, *supra* note 69, at 269, 271.

[89] Act of January 2, 1968, Pub. L. No. 90-248, §§ 104(d)(5)-106, 156(e)-159(b), 81 Stat. 833, 867-69, codified in scattered sections of 42 U.S.C. (1970).

because of increasingly rigorous review of benefit-denials within the administrative process.[90] In the fiscal period 1968-73, the SSA was affirmed in 58 percent of all social security cases, reversed in 14 percent and remanded in 28 percent.[91] These figures suggest that district court review, on the whole, is searching and sympathetic, and that placing appellate review on a discretionary basis would not leave claimants' rights inadequately protected.

We conclude that while denial of access to a court of appeals is not a step to be taken without compelling justification in the interest of a sound and effective judicial system, the proper circumstances for such a move may well be present, or imminent, in the social security area.[92]

A similar analysis should be made before adopting the suggestion of transferring review of such actions as Interior Department mining claims or federal employee discharges from district courts to the courts of appeals.[93] As with social security, we suspect the issues in both classes of cases are largely evidentiary and, especially in the employee cases, the immediate stakes relatively small. We have no information as to the number of mining cases; it appears that perhaps 200 employee cases were filed in the district courts in fiscal 1974, and we know of 28 appeals.[94] An extra 170 cases of this nature annually would not destroy the circuit courts (though over half the appeals were in a single circuit, the District of Columbia), but it is worth considering whether, given the caseload problem, even such an addition is justified. The more significant question is whether initial district court review of several such relatively small categories might in the aggregate provide substantial relief to the courts of appeals.

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[90] Under the established procedure, a claimant dissatisfied with the determination of the state agency, both initially and upon reconsideration, is entitled to a hearing before a federal administrative law judge, whose decision is reviewable in turn, either sua sponte or upon the claimant's request, by an Appeals Council. 20 C.F.R. §§ 404.901-404.990 (1974); *see* COMMITTEE STAFF REPORT, *supra* note 69, at 31-33. In the period 1960-73, the rate of reversals, both at the hearing and appeals levels, has dramatically increased. Reversals by administrative law judges increased from 19.3 to 52.1 percent; reversals by the Appeals Council, from 3.6 to 12.3 percent. *See* COMMITTEE STAFF REPORT, *supra* note 69, at 77, 247, 249, 254.

[91] HEW, OPERATIONAL ANALYSIS, *supra* note 88, at 31. House Ways and Means Committee statistics, which are somewhat less complete, indicate that in the period 1968-73, in disability cases either affirming or reversing the Secretary, the affirmance rate was 81 percent, rising to 85 percent in 1973. If total dispositions are taken to include benefit-allowances after court remand, the affirmance rate for the same period is 62 percent, rising to 64 percent in 1973. COMMITTEE STAFF REPORT, *supra* note 69, at 269, 271.

[92] The further question is whether steps should be taken to protect the district courts from the expected flood of social security cases. The fact that these litigants have already run the gauntlet of initial hearing and administrative review suggests that to interpose still another administrative hurdle might be practically tantamount to denying judicial review. The substantial disadvantages of creating a special court, constitutional or legislative, for social security cases are detailed below. *See* text following note 347 *infra*. We think that, given the noncollegial nature of the district courts, the best solution may be to appoint additional district judges.

[93] *See* note 27 *supra*.

[94] The General Counsel of the Civil Service Commission has informed us that 401 such cases were filed in all courts in fiscal 1974 and that in fiscal 1969 roughly half of such cases were filed in the Court of Claims. The appeal figure we derive from detailed information furnished by the Administrative Office to the Administrative Conference.

(b) *National Labor Relations Board.* (1) *Current Practice: Direct Court of Appeals Review.* The Labor Board seems, at first blush, a natural candidate for two-tier review. Its unfair labor practice decisions—reviewable in courts of appeals is either enforcement actions by the Board or review actions by the charged party[95]—make up by far the largest contribution of any agency to the direct-review caseload. In the last five fiscal years, they averaged 652 cases annually, 40 percent of all direct-review cases and nearly 45 percent of those outside the District of Columbia.[96] Here, if anywhere in the administrative area, there might seem a real opportunity for pruning. Moreover, Labor Board cases—unlike, for example, ratemaking or license decisions of the transportation and energy regulatory agencies—are not obviously unsuitable for initial district court review by virtue of their subject matter. Typically, they involve narrow questions of specific fact and of law, not broad issues of policy or discretion. And the economic interests at stake are often, though not always, too small to be worth pursuing through two levels of judicial review; as a practical matter, the district court would be the last stop.

(2) *Appraisal of Mandatory Two-Tier Review.* Yet the considerations favoring two-tier review seem to us heavily outweighed by those opposing it.[97] We might add, though this is not decisive, that we have found no Labor Board attorney or private labor practitioner who does not resist the idea of initial district court review. It is generally felt that district judges, apart from being less capable, on the average, than appellate judges, are also less familiar with the intricacies of the Labor Relations Act. In time, they would no doubt gain experience in labor matters but they could never gain as much as circuit court judges already have—there are simply too many district court judges and too few labor cases. Competence aside, labor relations is an area in which variations in attitude and philosophy among district judges are peculiarly likely to influence litigation outcomes; a multi-member court, with its tendency to neutralize bias, is especially valuable here. At present, the circuit courts, with one exception, are reasonably uniform in their treatment of Labor Board cases,[98] and there is no assurance that district judges would be like-minded. If

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[95] 29 U.S.C. § 160(e), (f) (1970).

[96] 1974 A.O. REPORT, *supra* note 1, table B3. This figure, however, may be grossly misleading. By the Board's own tally, the number of court of appeals decisions in review of enforcement cases in the period 1970-73 was only 1,384, an annual average of 346. 1970-73 NLRB ANN. REP., table 19. The discrepancy seems to lie in the fact that the Board's figure does not include, while the Administrative Office statistic apparently does, cases resolved by formal court-approved settlements in which the charged parties stipulated either to the dispositive facts or to the entry of a court of appeals judgment. Since the judgment in such cases is pro forma and consumes little if any judge time, it would be advisable, for our purposes, to think in terms of the smaller Board figure rather than the twice-larger Administrative Office figure. Even on this basis, however, the Board's contribution to the appellate caseload remains substantially larger than that of any other agency.

[97] *See* notes 54-60 and accompanying text *supra.*

[98] During fiscal years 1968-72, the percentage of Board decisions affirmed in full in all except the Eighth Circuit, ranged narrowly from 63.6 to 74.3 percent; every circuit,

they were not, forum shopping could become a much more serious problem for the Board.[99] Finally, the NLRB is one of the great independent agencies whose prestige makes direct review by a multi-member court seem particularly appropriate. In sum, the superiority, or at least the perceived superiority, of the court of appeals is a factor which in this area deserves more than usual weight.

Furthermore, in terms of efficiency, mandatory two-tier review for the Labor Board would be a doubtful prescription. For litigants who persevere to the appeals court, it would further delay what is already a lengthy process. The filing of a charge, informal efforts by the charging party (first at the regional, then at the national level) to secure issuance of a complaint by the General Counsel, formal hearing, successive decisions by the administrative law judge and by the Board typically consume more than 10 months, judicial review still to come.[100] District court review would add at least another six,[101] and in the busier big-city districts where labor litigation is heavy, much more.[102] All of this might conceivably be justified by the prospect of major savings to the judicial system, but there is no real prospect.

Whether in a two-tier scheme the appeal rate would be low enough to yield a net reduction in total judge-time, or a significant reduction in the appellate caseload, is entirely conjectural. The economic stakes in unfair labor practice cases, and the resources of the litigants, vary widely: A bare indication is the fact that a quarter of the situations that come before the Board involve establishments with fewer than ten employees; another quarter, establishments with 10 to 40 employees; and still another quarter, establishments with 190 or more employees.[103] Moreover, if employers charged with unfair labor practices frequently pursue judicial review, even in hopeless

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that is, was within 10 points of the national percentage of 65.8 percent. The affirmance rate for the Eighth Circuit, however, was only 44 percent. 1973 NLRB ANN. REP., table 19A, at 251.

[99] Forum-shopping by parties to NLRB proceedings has been the subject of much discussion and concern. *See, e.g.*, Comment, *Forum-Shopping in the Review of NLRB Orders*, 28 U. CHI. L. REV. 552 (1961). The NLRB itself informs us that its operations are not significantly affected by forum-shopping, *see* Letter from Peter G. Nash, General Counsel, NLRB, to Antonin Scalia, Chairman of Administrative Conference, Oct. 25, 1974, but we are told by Professor Clyde Summers, who is preparing a paper on the Board for the Commission on Revision of the Federal Court Appellate System, that shopping is still extensively practiced by private attorneys, despite the increasing uniformity in decisions by the various circuit courts.

[100] *Hearings on S. 3671 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 308 (1970) [hereinafter cited as *Hearings on S. 3671*].

[101] The median time interval, from filing to disposition, in all civil cases in all district courts in fiscal year 1973 was 10 months. Among cases disposed of prior to trial, however, the median time was only six months. 1973 A.O. REPORT, *supra* note 1, table C5.

[102] In the Southern District of New York, the period from filing to disposition was 25 months; in the Eastern District of Pennsylvania, 17 months. 1973 A.O. REPORT, *supra* note 1, table C5. There is some dispute as to whether the great urban districts are, in fact, the main loci of labor litigation. *See Hearings on S. 3671*, *supra* note 100, at 75.

[103] 1973 NLRB ANN. REP., App. table 18, at 248.

cases, for the purposes of delay, the two-tier system would play into their hands.

Thus, the picture is mixed: The Labor Board cases lie halfway between the small-litigant, small-stake model exemplified by the SSA and the large-litigant, large-stake model typified by the Federal Power Commission (FPC), Civil Aeronautics Board (CAB), Nuclear Reactor Commission (NRC, formerly the Atomic Energy Commission (AEC)), and by ICC railroad regulation. Mandatory two-tier review does not seem warranted or politically possible.

(3) *Appraisal of Discretionary Two-Tier Review.* There remains the question of discretionary two-tier review. Its sole advantage would be to assure a reduction in the appellate courts' on-the-merits caseload regardless of the rate of appeal. The present volume of labor appeals seems large enough to make this option worth considering, but the other two conditions we have suggested as prerequisites for discretionary review are not clearly satisfied. One cannot confidently say—as one could, for example, of social security, deportation, or longshoremen's compensation cases—that few Labor Board cases would qualify for discretionary review. A substantial number of such cases do involve issues of law transcending the particular situation, albeit usually narrow and technical questions of statutory construction and, more often, application. The ongoing conduct of labor-management relations frequently depends on there being authoritative answers to these questions. And even many cases challenging the substantiality of the evidence underlying the Board's orders involve important enough interests, either in purely monetary terms or in terms of the ongoing life of the plant, to make them eligible for discretionary review. The caseload savings, while probably substantial, might therefore be rather less than one would expect from the present volume of appeals alone. More important, and in our view decisive, is the widely perceived inferiority of the district court as a forum for labor matters, the felt danger of biased or misguided decisionmaking by district judges unversed in labor law. This consideration alone, we think, demands that the court of appeals be automatically available—if not as a first resort, certainly as a last.

We note, finally, that some good might be done by making Labor Board orders, like those of all other major independent administrative agencies, self-enforcing. This could be done by providing either that the Board's own order should be final unless a petition for review is filed within a specific period or that the Board's order shall be filed forthwith in the appropriate circuit court and entered as the decision of the court unless challenged within a designated period. This reform, recommended in one variation or another by the Administrative Conference[104] and others,[105] would have two potential advantages.

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[104] 1 ADMINISTRATIVE CONF. OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS, ACUS Rec. 10, at 24, 237 (1970) [hereinafter cited as ACUS Rec.].

[105] *See, e.g.*, ADVISORY PANEL ON LABOR-MANAGEMENT RELATIONS LAW [the "Cox

First, it would eliminate the period of delay that now elapses between issuance of a Board order and filing of an enforcement action. Second, it would relieve the circuit courts of those cases in which a non-complying charged party, though willing to resist an enforcement proceeding, would be unwilling to take the initiative in contesting the order. We see no justification for the present unique requirement that the Board go to court in order to give teeth to its decisions. Neither, however, would we expect the proposed change to yield more than marginal benefits. Whereas at one time a total of 100 days typically elapsed between issuance of the order and filing of the enforcement action,[106] the interval has now been reduced to about 30 days. We are told, moreover, by the head of the Appellate Branch of the Board's General Counsel's Office that many recalcitrant employers now abandon their opposition to the order when advised that an enforcement proceeding is about to be, or has just been, filed.[107] The number of cases removed from the appellate dockets by a self-enforcement provision might therefore be rather small. In any event, as Judge Leventhal has observed, Labor Board enforcement proceedings which are not truly contested are no great burden for the courts.[108]

(c) *Immigration and Naturalization Service: Deportation Cases.* (1) *Current Practice: Bifurcated Review.* Deportation orders of the Immigration and Naturalization Service (INS) are another category of cases that might be thought appropriate for two-tier review. Prior to 1961, they were in fact reviewed by district courts, either in habeas corpus or in nonstatutory actions for declaratory or injunctive relief under section 10 of the Administrative Procedure Act.[109] In that year, Congress, disturbed by "the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country,"[110] added section 106(a) to the Immigration and Nationality Act. The amendment eliminated the district court stage and gave courts of appeals exclusive jurisdiction to review "final orders of deportation."[111]

The wisdom of these amendments was sharply questioned by Judge Friendly in his 1972 Carpentier lectures. He argued that while the purpose of the legislation was to expedite the deportation of certain notorious aliens able to afford repeated dilatory appeals, in the majority of cases "it has probably had the opposite effect."[112] Whereas previously most aliens who failed

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Panel"], Report to Sen. Comm. on Labor & Pub. Welfare, Organization and Procedure of the NLRB, S. Doc. No. 81, 86th Cong., 2d Sess. (1960).

[106] 1 ACUS Rec. 10, *supra* note 104, at 259.

[107] Willingness to comply may be influenced by recent appellate decisions that a party frivolously opposing a Board order may be liable for the Board's court costs as well as his own.

[108] *See Statement of Judge Leventhal*, *supra* note 2, at 9-10.

[109] 5 U.S.C. § 703 (1970). *See* Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

[110] H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22-23 (1960).

[111] 75 Stat. 651, 8 U.S.C. § 1105a(a) (1970).

[112] H. Friendly, *supra* note 10, at 175-76.

to obtain a stay of their deportation orders in a district court did not appeal, the deportee, instead of having to act speedily, "now has six months to file a petition for review and this works as an automatic stay unless the INS moves to vacate it,"[113] as it rarely does. Moreover, he noted that the statute "has engendered numerous jurisdictional disputes which have already demanded three Supreme Court decisions and will probably require more."[114] The clear answer, he concluded, was to repeal section 106(a), return final deportation orders to the district courts, and expect the courts of appeals to give expeditious treatment to those district court orders that are appealed.

There is much to be said for this proposal. Deportation appeals rarely involve questions that transcend the particular case. The most frequent issue is whether the immigration judge acted arbitrarily in denying one of the many forms of relief which the statute commits to the Attorney General's discretion. The resources of a three-judge appellate court are arguably wasted on such deliberations.

Another consideration in favor of restoring deportation orders to the district courts is that it would eliminate the bifurcation of review that has resulted from the Supreme Court's interpretations of the scope of section 106(a). Under Immigration Service regulations, a deportation order is issued by an immigration judge after a formal trial-type proceeding,[115] in which the central issue, unless conceded, is the alien's deportability. Appeal lies to the Board of Immigration Appeals. In addition, however, the statute authorizes a variety of discretionary relief which, if granted, may have a bearing upon the question of deportability or upon the execution of the deportation order.[116] Certain of these discretionary determinations can be made only by an immigration judge in the course of a formal deportation proceeding; others must be made by district directors of immigration either before, during, or after—but outside the framework of—the deportation proceeding. The question thus posed, one which sharply divided the circuits, was whether some or all of these discretionary determinations were part of the "final orders of deportation" which section 106(a) makes reviewable in circuit courts. In a series of three decisions, the Supreme Court held that "final orders of deportation" include discretionary determinations by the hearing officer during and incident to the deportation proceeding,[117] and denials by the Board of motions to reopen deportation proceedings,[118] but do not include non-record discretionary determinations by district directors altogether outside the deportation proceeding.[119] The latter are still reviewable exclusively in district courts.

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[113] *Id.*

[114] *Id.*

[115] 8 U.S.C. § 1252(b) (1970); 8 C.F.R. § 242 (1974).

[116] *E.g.*, 8 U.S.C. § 1153 (1970) (classification as a preference-immigrant); *id.* § 1182(c) (waiver of inadmissibility); *id.* § 1182(e) (waiver of 2-year residency requirement for exchange visitors); *id.* § 1253(h) (withholding of deportation); *id.* § 1254(a) (suspension of deportation); *id.* § 1254(e) (voluntary departure); *id.* § 1255(a) (adjustment of status); *id.* § 1258 (change of non-immigrant classification); *id.* § 1259 (record of admission for permanent residence).

[117] Foti v. INS, 375 U.S. 217 (1963).

This split-level scheme of review has evoked a good deal of criticism. Professor Davis has argued that the present bifurcated structure produces confusion, wasteful jurisdictional litigation and piecemeal review, and should be replaced by a single judicial remedy, be it at the district or appellate court level.[120] The Immigration Service itself favors the latter solution. It maintains that the continued availability of district court review for non-record discretionary determinations defeats the congressional purpose to shorten the deportation process and minimize stalling tactics; and in 1971 it proposed legislation to broaden section 106(a) so as to make all deportation-related decisions reviewable solely by circuit courts.[121] This approach is open to the persuasive objection that it would add to the already bulging dockets of the appellate courts a class of cases—non-record discretionary determinations by immigration field officers—that could hardly be less suitable for appellate review. The alternative solution—returning record determinations to the district courts—seems, from that standpoint, far preferable.

Furthermore, even if one assumed that interposition of the district courts would, in the net, increase somewhat the total time required for judicial review of deportation, the savings from direct appellate review would probably be quite small in relation to the total period of review, especially in those cases, of principal concern to Congress, in which the alien is determined to postpone deportation as long as possible.[122] The ability of determined aliens to postpone the evil day has very little to do with the existence of two levels rather than a single level of review. It has everything to do with the persistence and ingenuity of counsel in plying the INS with new applications for discretionary relief, the denial of which then provides a pretext for successive challenges in court. That avenue of abuse would in no way be widened by a transfer of responsibility from appellate courts to district courts.[123]

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[118] Giova v. Rosenberg, 379 U.S. 18 (1964).

[119] Cheng Fan Kwok v. INS, 392 U.S. 206 (1968).

[120] K. DAVIS, *supra* note 43, § 23.03, at 798-99 (1970 Supp.).

[121] H.R. 2328, 92d Cong., 1st Sess. § 7 (1971). Professor Jaffe also appears to favor this solution. L. JAFFE, *supra* note 4, at 422.

[122] The point is well illustrated by some of the "horror stories" cited by the House Judiciary Committee in describing the dilatory tactics sought to be remedied in section 106(a). H.R. REP. No. 565, 87th Cong., 1st Sess. 7-11 (1961). The most notorious instance was that of Carlos Marcello, who was ordered deported in February, 1953, yet after seemingly endless litigation still remained in the country in June, 1961. Marcello filed five successive district court proceedings challenging either the district court deportation order or the denial of discretionary relief. Three times he appealed to the courts of appeals (once successfully). Twice he carried his case to the Supreme Court. Among the many circumstances that conspired to frustrate efforts at deportation, the availability of district court review was a very minor one. All told, the five district court proceedings consumed about 15 of the nearly 100 months during which Marcello evaded banishment. Furthermore, nearly half of the months were spent in the two proceedings in which, because the trial court proceedings were not appealed, only a single stage of review occurred.

It might, of course, be objected that district court review would be useless at best, and at worst highly mischievous, in an area where litigants so frequently have no object other than delay. Their cases, one might expect, would inevitably reach the court of appeals anyway. Yet this is far from clear. It is noteworthy that in fiscal year 1961, the last full year before section 106(a) went into effect, 162 deportation cases were commenced in the district courts of the Second Circuit, yet only 15 appeals were docketed in the circuit court.[124] It may well be, moreover, that a deportation case can be decided more quickly in a district court than in a circuit court. The great majority of declaratory judgment actions challenging the denial of discretionary relief by district directors are disposed of on the Government's motion for summary judgment or the plaintiff's motion for preliminary injunction within weeks, often within days, of their commencement. In the circuit courts, on the other hand, the process of briefing, argument and decision regularly requires several months. True, this pattern is now changing as courts of appeals, beset by mounting caseloads, increasingly resort to summary or abbreviated procedures. But until those procedures are more widely used, the district courts, by and large, will continue to be the more expeditious forum at the initial stage of review.

(2) *Appraisal of Two-Tier Review.* Despite all we, and Judge Friendly, have said, restoration of district court review of deportation orders does not promise sufficient advantage to make it worth the while. Unlike social security, deportation does not present a caseload problem of significance. In the fiscal period 1970-74, while the total caseload of the circuit courts was increasing by about 40 percent (from 11,662 to 16,436), the deportation component declined by about the same percentage (from 413 to 237) and its share of the total from 3.5 to 1.4 percent.[125] This drop is surprising in view of the sharp increase in aliens apprehended by the INS, and hearings held by immigration judges, during the corresponding period. Indeed, the judicial trend may be reversing itself. In the last two years, deportation cases have rather sharply increased (from 175 to 237). But even if the caseload continues to rise in this

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[123] In the eyes of many knowledgeable government attorneys, the truly mischievous feature of the present scheme of review is not the continuing role of district courts but the automatic stay of deportation once appeal is perfected to the circuit court. 8 U.S.C. § 1105a(a)(3) (1970). They point out that whereas district court review adds days or weeks to the deportation process, court of appeals review typically takes months, and the automatic stay provides this respite even for the patently dilatory appellant.

This argument might have been highly persuasive before the advent of summary review procedures in the appellate courts. It is much less so now that those procedures enable the courts to dispose of patently frivolous petitions on roughly the same showing by the Government, or lack of showing by the alien, which would be needed to deny a stay of deportation even were it discretionary. Moreover, the automatic nature of the stay matters far less than the attitudes of the judges.

[124] *See* Foti v. INS, 308 F.2d 779, 785 n.6 (2d Cir. 1962), *rev'd*, 375 U.S. 217 (1963).

[125] 1974 A.O. Report, *supra* note 1, table B3.

fashion, it will remain relatively small, and the extent to which two-tier review would reduce it is largely speculative. To be sure, the burden is not uniformly distributed among the circuits. The Ninth is by far the busiest with nearly half the cases in fiscal 1972; the Second a distant runner-up that year with about 13 percent.[126] For the Ninth Circuit, a district court screen might be of some help; for other circuits, the relief would be negligible.

The argument for two-tier review as an antidote to bifurcation is also ultimately unpersuasive. Bifurcation does not seem to us as great a problem as it seems to many others. The element of uncertainty that once surrounded the jurisdictional issue, and generated three Supreme Court and countless circuit decisions, has now been greatly reduced by the drawing of a bright line between decisions of immigration judges, reviewable only by courts of appeals, and decisions of district directors, reviewable only by district courts. Few competent lawyers are any longer apt to find themselves (by mistake, at least) in the wrong court.

To be sure, bifurcation may, as Professor Davis observed, result in fragmentary review of a single deportation case in those situations where the district director's determination could be reviewed at the same time as the order of deportation but must be routed instead to the district court for separate treatment. But this problem could easily be cured by a holding that the district director's determination is reviewable along with the deportation order on a theory of pendent jurisdiction.[127] Furthermore, the bifurcated system does not create, and its elimination would not cure, what is perhaps the most serious source of delay and multiple litigation in the deportation area—the ability of the alien to file successive petitions for review from successive denials of administrative relief, limited only by the seemingly inexhaustible ingenuity of counsel and the patience of the courts. Elimination of district court jurisdiction might shorten each round of review, but it would not reduce the number of rounds.

In sum, we see no great advantage in a return to two-tier review. There are, moreover, at least two hazards: the risk that the extra stage of review will be exploited for delay; and the danger, feared by attorneys on both sides, that district judges are more apt to be swayed by subjective attitudes for or against the alien than multi-member appellate courts. We note, finally, that we do not find the present scheme as irrational and conceptually untidy as many critics do. That the informal discretionary determinations of an administrative official should be reviewed in the first instance by a single district judge (capable, if need be, of taking evidence) while the formal, on-the-record, albeit equally discretionary, determinations of a quasi-judicial hearing officer should be reviewed directly by a court of appeals does not, in principle, seem offensive.

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[126] These figures were obtained from the Administrative Office of the United States Courts; we have no reliable figures for later years.

[127] The Supreme Court has expressly declined to decide whether a circuit court, entertaining an appeal from a final order of deportation, might have "pendent jurisdiction" to review a denial of discretionary relief. Cheng Fan Kwok v. INS, 392 U.S. 206, 216 n.16 (1968); *compare* Dong Yup Lee v. INS, 407 F.2d 1110 (9th Cir. 1969) (reviewed denial of visa petition presented during pendency of deportation hearing, but found no authority to review similar denial before proceeding commenced), and Dibadj v. INS, 411 F.2d 983 (3d Cir. 1969) (denial of waiver for exchange visitor after deportation proceedings completed held not reviewable with deportation order), *with* Wei-Ming Chang v. INS, 418 F.2d 1334 (9th Cir. 1969) (denial of waiver for exchange visitor before commencement of deportation, jurisdiction assumed and denial upheld), and Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969) (same).

(d) *Department of Labor: Longshoremen's Compensation and Black Lung.* (1) *Current Practice: Direct Court of Appeals Review.* Prior to 1972, decisions of deputy commissioners—officers who investigated claims and held hearings—under the Longshoremen's and Harbor Workers' Compensation Act of 1927 were subject to review in the district courts.[128] This was entirely understandable: The stakes and the litigants (at least the claimants) were typically small, and issues of law or policy rarely presented. The volume of cases, to be sure, was not high. In the five-year period from November, 1963 to June, 1968, there were about 70 district court filings annually, and in later years they declined to a low of 44 in fiscal 1972.[129] We do not have solid data on the number of appeals from district to circuit courts, but it appears there were fewer than 20 per year.[130] In 1972, Congress amended the Act to provide for direct court of appeals review of longshoreman compensation cases. At the same time, it added a stage of review to the administrative process by establishing a Benefits Review Board[131] to receive appeals from the decisions of administrative law judges, to whom the hearing functions previously conducted by deputy commissioners were now assigned.[132] The change in the judicial review provision is not explained in the legislative history, but one can reasonably assume it reflected a congressional judgment that the added opportunity for administrative review made the district court review unnecessary and potentially exhausting.

One might have thought that the institution of direct review would produce a substantial increase in caseload for the courts of appeals, perhaps even to the level previously experienced by the district courts. This does not appear to have happened. From March, 1973, when the change went into effect, to November, 1974, only 19 longshoreman compensation cases were filed in the circuit courts,[133] less than one per month as compared to the nearly four per month average in the district courts in the last full fiscal year before the amendment, and to the nearly six per month in the late 1960's. Indeed, it is not clear that the new procedure has added anything at all to the appellate dockets.

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[128] 44 Stat. 1436, 33 U.S.C. § 921 (Supp. II, 1972).

[129] These incomplete figures were supplied us by members of the staff of the Solicitor of the Department of Labor.

[130] According to figures supplied us by the SSA, there were five filings and 19 decisions at the circuit court level in fiscal 1972, and nine decisions in fiscal 1970.

[131] 33 U.S.C. § 921 (Supp. II, 1972).

[132] *Id.* § 919 (Supp. II, 1972).

[133] These statistics were supplied us by the office of the Solicitor of the Department of Labor.

We can only speculate as to the reason. One possibility is that litigants found the district court a more inviting forum. The other, much more likely, possibility is that for many litigants the new Benefits Review Board is serving as a substitute for the district court, meeting their need for a forum in which to challenge the decisions of the hearing officers and thus making it unnecessary for them to go to court. In the first eleven months of 1974, well over 200 appeals were filed with the Board in longshoreman cases,[134] all of which, if pressed at all, would previously have been routed directly to the judicial system. In sum, the Board seems to be performing for the circuit courts the same screening function that district courts usually perform. The moral of the story seems to be that the best way to reduce the judicial burden of reviewing administrative action is to provide a sufficiently lengthy process of administrative review within the agency. Unfortunately, the opportunities for that are distinctly limited; the former procedure under the Longshoremen's Act, which sent the decisions of hearing officers directly to the courts, was rare, if not unique.

The number of longshoreman cases in the courts of appeals will increase substantially in the next few years, if only because, as another of the 1972 amendments, Congress expanded the coverage of the Act to include injuries incurred in areas—for example, piers, wharfs, terminals—adjoining the navigable waterway itself.[135] This extension has virtually doubled the volume of compensation claims. Even so, it is clear that longshoreman's cases present no major caseload problems for the courts of appeals and no great opportunity for savings.

(2) *Potentially Increasing Caseload Burden: Appraisal of Need for Two-Tier Review.* One cannot be at all sure this will remain the case with respect to black lung compensation claims filed after January 1, 1974, which, pursuant to the Black Lung Act of 1972,[136] are administered, in the absence of an approved state workmen's compensation scheme, by the Secretary of Labor in accordance with the provisions of the Longshoremen's and Harbor Workers' Act.[137] The shift of administrative responsibility for black lung claims from Social Security to Labor was natural enough, since the post-1973 claims are governed by what is essentially a workmen's compensation scheme, with primary liability for payment of benefits assigned to employers rather than to the Government. Nevertheless, the transfer has created an anomaly

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[134] As of November 20, 1974, 208 cases had been filed with the Board during the calendar year.

[135] 33 U.S.C. § 903 (Supp. II, 1972).

[136] 30 U.S.C. §§ 901-941 (Supp. III, 1973).

[137] *Id.* §§ 931-32 (Supp. III, 1973).

and, potentially, a problem. Whereas the black lung cases administered by Social Security are reviewed in the first instance by district courts, those administered by the Labor Department will be reviewed directly by circuit courts. The question thus arises whether the caseload considerations which virtually rule out direct review in the former area may not apply to the latter as well.

Since the Benefits Review Board has not yet decided its first black lung case, it is hard to estimate what the judicial burden will be. In fiscal 1974, 464 black lung cases were filed against the SSA in district courts; nearly as many (450) were filed in the first four months of fiscal 1975—200 in October alone, the last month on record. With the caseload thus rising, and with the number of Appeals Council (the final stage of administrative review) filings for the first quarter of fiscal 1975 more than doubling those for the entire fiscal year 1974,[138] it would not be surprising if district court filings for the year exceeded 3000. We hasten to reassure the reader that there is no danger the Labor Department's black lung litigation will approach this scale. The great majority of those eligible for benefits filed their claims prior to 1974; the number of claims received by the Labor Department is therefore very much smaller than the number received by SSA.[139]

Even so, it is evident that the volume of black lung cases directly reviewable by the courts of appeals could be very substantial. Indeed, superficially at least, one might expect a given number of administrative decisions to generate a larger volume of court litigation with respect to post-1973 cases than for those filed earlier, since the former involve not only the traditional medical issues that go to eligibility but also difficult problems of employer liability. Labor Department attorneys, however, foresee no caseload problem for the circuit courts. They acknowledge that a number of important legal issues, mainly jurisdictional, will have to be litigated in the first year or two of operation, but after that they expect a gradual decline in filings. They anticipate that coal mine operators will, for the most part, acquiesce in administrative determinations of liability, at least where the staff has built a proper record, and that the medical issues will present many fewer difficult factual questions than the pre-1974 claims, since a great proportion of the latter were filed by older miners and widows and had to be decided on the basis of stale records.

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[138] These figures were supplied by the Bureau of Hearings and Appeals of the SSA.

[139] Figures supplied by the Management Information and Appraisal Branch of the Office of Administration of the SSA indicate the number of black lung claims received at the intake level for fiscal 1972 and subsequent years as follows:

1972	75,337
1973	148,985
1974	82,799
1975 (July 1-Nov. 20)	18,425

The 1974 and 1975 claims, though filed initially with SSA, are administered by the Labor Department.

We are not able to assess these predictions with any confidence. We suggest, however, that black lung litigation may prove to be a source of serious, if temporary, docket pressures for the courts of appeals a year or two from now, and that it bears close watching. If it were concluded that initial district court review would significantly reduce appellate dockets, we see no telling objection on other grounds.

B. *Informal Rulemaking*

1. *Direct Court of Appeals Review: Rule-Order Distinction.* Statutes providing for judicial review commonly speak of "orders," which the Administrative Procedure Act defines as final dispositions in matters "other than rule making."[140] It is no surprise that this definition was never read into the statute providing for three-judge district court review of ICC "orders,"[141] since that agency's substantial ratemaking business, though later classified as "rule making" by the APA,[142] was clearly meant to be included. Under the same statute and others based upon it, the Supreme Court has also construed "orders" to include general regulations adopted under the informal notice-and-comment provisions of the APA.[143] Thus, the Supreme Court in *CBS v. United States*[144] held the FCC's chain-broadcasting regulations reviewable by a three-judge district court under a statute that incorporated the ICC provisions, and in *United States v. Storer Broadcasting Co.*,[145] after review of FCC "orders" had been transferred to the circuit courts, held its regulations directly reviewable there. In both cases the Court may have been influenced by the fact that the alternative was no review at all; it focused solely on questions of standing or ripeness for review, not discussing whether review should have been sought in a regular district court.

Nevertheless, the District of Columbia Circuit in the influential case of *United Gas Pipe Line Co. v. FPC*[146] refused direct review of a Power Commission regulation under a statute similar in wording to the ICC provision. The statute, said the court, provided for "substantial evidence" review on the record at the instance of a party to the administrative proceeding. These provisions were said to contemplate "review of a decision based on evidence presented in a quasi-judicial proceeding before the Commission,"[147] and to "evidence Congressional recognition that an appellate court has no intelligible basis for decision unless a subordinate tribunal has made a record fully encompassing the issues."[148] *United Gas Pipe* was immediately followed by a similar ruling under the Civil Aeronautics Act[149] and has frequently been cited since, most recently by the Third Circuit in holding a newly promulgated regulation of the Securities and Exchange Commission (SEC) not an "order" directly reviewable in the court of appeals.[150] As a result of such reasoning, the avenue for pre-enforcement review of regulations, even of those promulgated by agencies whose final adjudicative orders go directly to an appellate court, is often an action for injunction or declaration under general jurisdictional provisions in a district court.[151] This is, of course, the avenue for pre-enforcement challenges to the constitutionality of statutes. In fact, early decisions, influenced no doubt by the quasi-legislative nature of administrative regulations, tended to treat them like statutes for purposes of judicial review.[152]

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[140] 5 U.S.C. § 551(6) (1970).
[141] Now 28 U.S.C. §§ 1336, 2325 (1970).
[142] 5 U.S.C. § 551(4) (1970).
[143] *Id.* § 553.
[144] 316 U.S. 407 (1942).
[145] 351 U.S. 192 (1956).
[146] 181 F.2d 796 (1950).
[147] 181 F.2d at 798.
[148] *Id.* at 799.

The *United Gas Pipe* rationale is in decline, however, both legislatively and judicially. In recent years, Congress, building on the precedent of price regulation during the Second World War,[153] has expressly authorized direct circuit court review of agency regulations in such fields as automotive and consumer-products safety, occupational health, water and air pollution, and noise.[154] The court that decided *United Gas Pipe*, having now undertaken direct review of regulations of both the FPC[155] and the CAB,[156] has redefined its position: *United Gas Pipe* "has not been followed . . . where evidence has been assembled before the agency and is not challenged, and where the issues presented are legal and not factual."[157] In such a case, there is "no need to have the matter adjudicated at the district court level in order to have an appropriate record compiled. It is the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone."[158] The author of *United Gas Pipe*, Chief Judge Bazelon, noting

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[149] Pub. L. No. 85-791, § 18, 72 Stat. 947 (1958); Arrow Airways v. CAB, 182 F.2d 705 (D.C. Cir. 1950).

[150] PBW Stock Exchange, Inc. v. SEC, 485 F.2d 718 (3d Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). The American Law Institute's FEDERAL SECURITIES CODE would reverse the result in the *PBW* case by providing for direct circuit court review not only of a "final order" but also of "other final action" of the SEC, including rules. ALI FEDERAL SECURITIES CODE § 1415(a) (Tent. Draft No. 3, 1974). *See also* S. 2519, § 6(a), 93d Cong., 1st Sess. (1974) (SEC regulations approving, disapproving, or modifying rules of exchanges would be treated as "orders" and thus be reviewable in the courts of appeals).

[151] *See, e.g.*, Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967) (Food and Drug Administration). Similarly, in Canada it is only "quasi-judicial" as opposed to "administrative" orders that are reviewed directly in the appellate court. Federal Court Act 1970, 19 Eliz. 2, c. 1, § 28.

[152] *See, e.g.*, Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935).

[153] Emergency Price Control Act of 1942, ch. 26, tit. II, § 204, 56 Stat. 31 (1942).

[154] 15 U.S.C. § 1394 (1970) (automotive safety); *id.* § 2060 (consumer products safety); 29 U.S.C. § 655(f) (1970) (occupational health and safety); 33 U.S.C. § 1369(b) (1970) (water pollution); 42 U.S.C. §§ 1857h-5(b) (1970) (air pollution); *id.* § 4915(a) (noise). *See also* note 150 *supra*.

[155] City of Chicago v. FPC, 458 F.2d 731, 740-41 (D.C. Cir. 1971); New England Power Co. v. FPC, 467 F.2d 425 (D.C. Cir. 1972). The Supreme Court passed on the merits in the latter case without adverting to the issue of direct review, FPC v. New England Power Co., 415 U.S. 345 (1974).

[156] Deutsche Lufthansa Aktiengesellschaft v. CAB, 479 F.2d 912 (D.C. Cir. 1973).

[157] *Id.* at 915-16.

[158] *Id.* at 916.

Professor Jaffe's criticism that the decision divided review of a single agency between trial and appellate courts, has now abandoned it altogether.[159]

Most recently, however, doubts have been raised once again about the appropriateness of direct appellate review of informal rulemaking. Concurring in *Texas v. EPA*,[160] a challenge to the regulations for implementing air-quality standards in Texas, Judge Clark of the Fifth Circuit protested "the adverse effects flowing from the legislative mandate that judicial review proceedings be injected into the court system at the appellate level."[161] He explained:

> No formal hearing has ever been held in this highly technical, factually complex matter. The administrative "record" upon which we had to base our review was comprised of only the sparsest of documentation, for it essentially evolved from an act of agency rulemaking. . . . The writing judge was required to hold both pre- and post-argument conferences with counsel for the parties to enable the three of us as a court to comprehend the substance of the issues and conduct a minimally meaningful review.
>
> The subject matter of this action involves the health and welfare of millions of citizens, the continued business vitality of tens of thousands of firms and compliance expenditures costing billions of dollars.
>
> These extensive rights deserve a more orderly process of judicial reflection.[162]

Judge Clark did not further specify what judicial processes would be more orderly or otherwise more appropriate.

Still more recently, the First Circuit in *South Terminal Corp. v. EPA*[163] lamented that upon direct review the only way to obtain additional information as to facts not adequately established in a rulemaking proceeding is to remand to the agency: "The normal way courts evaluate a technical issue is through proceedings attended by expert witnesses."[164]

2. *Appraisal of Need for Appellate Court Factfinding.* Whether direct appellate review of informal rulemaking makes good sense depends in the first instance upon whether *United Gas Pipe* was correct in its perception that the need for judicial trial of the facts renders the appeals court an inappropriate forum. When regulations are required to be based upon a trial-type administrative record, as in the widely criticized Food and Drug

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[159] Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1098-99 & n.27 (D.C. Cir. 1970) (Bazelon, J.) (dictum), *citing* L. JAFFE, *supra* note 4, at 423.

[160] 499 F.2d 289 (5th Cir. 1974).

[161] *Id.* at 321.

[162] *Id.* at 321-22.

[163] 504 F.2d 646 (1st Cir. 1974).

[164] *Id.* at 665-66. *See also* 52 TEXAS L. REV. 1014, 1021 (1974) (district court was a preferable forum for reviewing the SEC regulation challenged in PBW Stock Exchange, Inc. v. SEC, 485 F.2d 718 (3d Cir. 1973), *cert. denied*, 416 U.S. 969 (1974), "because the case raises factual issues [such as 'the rule's potential anticompetitive effects'] that can be more efficiently determined in a trial court").

Administration procedure,[165] facts relevant to the validity of the regulation present no problem: Validity is determined on the administrative record. More commonly, however, regulations are adopted after notice and opportunity for comment, with no express APA requirement that the agency base its action on the record.[166] It is therefore conceivable that a judicial hearing may be necessary to elicit facts bearing upon the question of validity.

The scope of judicial review of informal rulemaking is currently a matter of interesting debate.[167] Except where the agency is required to decide on a record, the APA limits review generally to such "legal" questions as whether agency action is within statutory authority or is "arbitrary."[168] At least one circuit court has held that the sole test of validity was "whether on the factual premise upon which the Commission acted" the rule adopted was arbitrary, for "if the factual premise itself were open to review, then it would be necessary for all general rule-making to include a trial-like hearing."[169]

If the factual premises underlying a regulation are unchallengeable in court, there is obviously no need for a trial to determine their correctness. This approach, however, is clearly in disfavor, and properly so. Statutory authority, though a "legal" question, is often dependent upon the existence of certain facts. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[170] for example, the administrator was authorized to approve federal funding of a highway through a park only if there was no "feasible and prudent alternative."[171] The Court said a reviewing tribunal must determine "that the Secretary could have reasonably believed that in this case there are no feasible alternatives."[172] The further "legal" guarantee against arbitrariness similarly demands a factual investigation: It requires, according to *Overton Park*, a court to determine whether an administrator's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment."[173] These criteria, although enunciated in the context of informal adjudication, are equally appropriate in review of regulations, and they have been widely applied in such cases.[174] We do not see how a court, without delving into the facts, can responsibly determine whether or not a regulation meets a statutory requirement that emission standards be "achievable" by control systems that have been "adequately demonstrated,"[175] or whether a motor vehicle safety standard is "practicable" and meets "the need for motor vehicle safety."[176]

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[165] 21 U.S.C. § 371(e) (1970). *See* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 Calif. L. Rev. 1276 (1972).

[166] 5 U.S.C. § 553 (1970).

[167] *See* Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185 (1974).

[168] 5 U.S.C. § 706 (1970).

[169] Superior Oil Co. v. FPC, 322 F.2d 601, 619 (9th Cir. 1963). The court in *Superior Oil* relied upon the leading case of Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935), where Mr. Justice Brandeis had written that if "any conceivable state of facts" would make a state regulation valid, those facts should be presumed to exist. But *Pacific States Box* did not hold the presumption irrebuttable; it merely held that it was not overcome by general allegations that the regulation served no valid purpose.

[170] 401 U.S. 402 (1971).

[171] *Id.* at 405.

[172] *Id.* at 416.

[173] *Id.*

To say that courts should and increasingly do scrutinize the factual support for regulations does not imply, however, that the relevant facts must be developed in court, much less by an evidentiary trial. The Office of Price Administration (OPA) legislation, for example, initially interposed before appellate court review an administrative appeal in which a full hearing could be had on any relevant facts.[177] More significantly, while other direct-review statutes contain no comparable provisions, courts of appeals are increasingly finding ways to base their factual scrutiny of regulations on materials that were in some manner brought out before the rulemaking agency.

The Occupational Safety and Health Act (OSHA), for example, makes this construction easy. Although it does not require the Department of Labor to conduct a trial-type hearing,[178] it explicitly makes the Secretary's determinations underlying a regulation "conclusive if supported by substantial evidence in the record considered as a whole."[179] This provision, the Second Circuit has held, imposes "some responsibility on the part of the Department to explain and support the proposals it is advancing, at least when these have been opposed on substantial grounds."[180] Since the statute does not make clear that the "record" that must support the regulation is the record made before the agency, it might be read as allowing new factual material to be presented in court. In accordance with the usual meaning of the term, however, the Department of Labor by regulation construed the statute—correctly, according to the Second Circuit[181]—to require that the rulemaking itself be done "on the basis of a record to which a substantial evidence test . . . may be applied."[182] Thus, in remanding for want of record support, the court insisted that the Department should have presented "at the outset of the hearing some justification" for its proposed regulation.[183] The District of Columbia Circuit, while concluding that policy, as opposed to factual, determinations do not lend themselves to evaluation in light of evidence, agreed that the statute requires the Secretary to make factual decisions on the record before him, and judicial review is to be based on that record.[184]

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[174] *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973), *cert. denied sub nom.* Portland Cement Corp. v. Administrator, 417 U.S. 921 (1974). *See also* City of Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971) ("[I]t makes little sense to require that the legislature articulate intelligible standards to govern agency action if realistic inquiry into whether those standards are being followed were foreclosed.").

[175] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied sub nom.* Portland Cement Corp. v. Administrator, 417 U.S. 921 (1974).

[176] *See* Chrysler Corp. v. Department of Transp., 472 F.2d 659 (6th Cir. 1972).

[177] Emergency Price Control Act of 1942, ch. 26, tit. II, §§ 203-04, 56 Stat. 31 (1942). A later amendment authorized the Emergency Court of Appeals (ECA) to pass on regulations, following entry of a civil or criminal judgment, without prior administrative hearing, but allowed a reference to the Administrator in such cases in lieu of a court trial. Act of June 30, 1944, ch. 325, tit. II, § 107, 58 Stat. 639; *see* ECA R. 18, following *id.* § 107, providing that upon satisfactory offer of proof the court might refer to the Administrator or hear the facts itself by depositions, interrogatories, affidavits, or "in open court." Section 204(c) gave the ECA, sitting in panels of three or more, the "powers of a district court" except that no preliminary relief against price regulations could be granted. Ch. 26, tit. II, § 204(c), 56 Stat. 32.

[178] Under 29 U.S.C. § 655(b)(3) (1970), the Secretary upon request must afford a "public hearing" on the proposed standards. Provisions in the same section that he designate "a time and place" for the hearing, and that the request be made during "the period provided for the submission of written comments," preclude reading the hearing requirement as satisfied by informal notice-and-comment procedure, as the Supreme Court held with respect to the Interstate Commerce Act, 49 U.S.C. § 1(14)(a) (1970) (ICC freight-car allocation regulations) in United States v. Florida East Coast Ry., 410 U.S. 224 (1973). At the same time, however, the abandonment of an earlier House bill provision that would have required a trial-type hearing has led two circuit courts understandably to the conclusion that the hearing required is only a "legislative" one (not a quasi-judicial trial) characterized by speechmaking in support of or against the proposed regulation. Associated Indus. of N.Y.S., Inc. v. Department of Labor, 487 F.2d 342, 348-49 (2d Cir. 1973); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974). Both courts, however, required that the Department's regulations be based on the "record." 487 F.2d at 349; 499 F.2d at 475-76. In order to facilitate the compilation of such a "record," the Department has modified its procedures to allow, for example, some cross-examination. 29 C.F.R. § 1911.15 (1973).

Even statutes less explicit than OSHA have been construed by some circuit courts to impose the same requirement. The National Traffic and Motor Vehicle Safety Act is silent as to hearings,[185] and it says nothing about the standard of review. Yet it does require filing in the circuit court of the "record" on which the order setting the standard was "based."[186] The Sixth Circuit has read this requirement to mean that review is to be on the basis of that record and that the "substantial evidence" test applies.[187]

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[179] 29 U.S.C. § 655(f) (1970).

[180] Associated Indus. of N.Y.S., Inc. v. Department of Labor, 487 F.2d 342, 351 (2d Cir. 1973).

[181] *Id.* at 349.

[182] *Id.*

[183] *Id.* at 351.

[184]
> What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another. Where that choice purports to be based on the existence of certain determinable facts, the Secretary must, in form as well as substance, find those facts from evidence in the record. . . .

Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475-76 (D.C. Cir. 1974).

[185] 15 U.S.C. § 1392(b) (1970) provides only that safety standards shall be adopted in accord with the Administrative Procedure Act, which in the absence of specific statutory direction requires only notice and comment, 5 U.S.C. § 553 (1970). *See* Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968) (upholding informal rulemaking).

[186] 15 U.S.C. § 1394(a) (1970).

[187]
> Clearly when factual issues are involved, including the issue of whether compliance is technologically feasible, the reviewing court must consider the record upon which the Agency based its order. . . . [A]ny rule which is required to be, inter alia, "practicable" and "objective" must be reviewed on the basis of the data which the Agency considered in its promulgation, regardless of whether formal hearings were or were not held.

Chrysler Corp. v. Department of Transp., 472 F.2d 659, 668 (6th Cir. 1972). *But see* Boating Industry Ass'n v. Boyd, 409 F.2d 408, 411 (7th Cir. 1969) (rejecting applica-

The Clean Air Act[188] is devoid of any suggestion that judicial review of Environmental Protection Agency (EPA) regulations is to be based upon material that was before the Administrator. Yet in remanding an emission standard to the agency for inadequate disclosure of the basis for its initial proposal, the District of Columbia Circuit has gone a long way toward so holding. Regulations, wrote Judge Leventhal in *Portland Cement Ass'n v. Ruckelshaus*,[189] may not be promulgated on inadequate data

> or on data that, to a critical degree, is known only to the agency . . . . [I]nformation should generally be disclosed as to the basis of a proposed rule at the time of issuance [and court challenges must generally be] limited to points made by petitioners in agency proceedings.[190]

None of these decisions squarely rejects an effort to bring before the court factual information that was not made a matter of record before the agency, for in none was that the issue. Yet the clear trend of such decisions is to base judicial review upon an administrative record, despite the absence of a trial-type hearing. If such is the law, there is no need for a judicial trial of facts relating to validity.

This view of the reviewing function derives support from Mr. Justice Frankfurter's opinion for the Supreme Court in *National Broadcasting Co., Inc. v. United States*,[191] affirming the decision of a three-judge district court upholding FCC chain-broadcasting regulations as adopted. Not only does the opinion state that "[o]ur duty is at an end when we find that the action of the Commission was based upon findings supported by evidence,"[192] but it goes on explicitly to say that matters not before the FCC should not be considered:

> The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper.[193]

Yet it would be too hasty to conclude that materials not placed in the record before the rulemaking agency may never be produced in court. The Consumer Product Safety Act, for example, though requiring that the Commission file the "record of proceedings" on which it "based its rule" and providing that Commission findings be upheld only if supported by "substantial evidence on the record taken as a whole," goes on to define the

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tion of the "substantial evidence" test to vehicle-safety standards because the statute does not require an agency hearing).

[188] 42 U.S.C. § 1857 (Supp. III, 1973).

[189] 486 F.2d 375 (D.C. Cir. 1973).

[190] *Id.* at 393-94.

[191] 319 U.S. 190 (1943).

[192] *Id.* at 224.

[193] *Id.* at 227.

"record" to include not only such matters as the notice of proposed rulemaking and the comments received, but also "any other information which the Commission considers relevant to such rule."[194] This appears to embrace material not made public during the rulemaking proceedings and even, perhaps, material not considered by the agency in adopting the rule. Similarly, the Administrative Conference has recommended that the record on review of informal rulemaking include factual information not elsewhere included in the record "that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule."[195] And the First Circuit in *South Terminal Corp.* v. *EPA*[196] recently indicated that additional material would sometimes be appropriate for introduction at the judicial review stage.

If factual material may be presented for the first time in court, fairness surely demands that affected persons have an opportunity for rebuttal, either in court or before the agency, and neither alternative is very palatable. For the reviewing court to accept rebutting information and to make its own decision based upon material not considered by the rulemaking agency, as suggested in *South Terminal*,[197] would hardly be consistent with the statutory command that the agency make the regulations. What the Supreme Court said in refusing to allow new evidence in court upon review of a rate order seems equally applicable here: "To allow [the] . . . findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate making [or rulemaking] body."[198] The alternative is a time-consuming remand to the agency for additional input.[199]

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[194] 15 U.S.C. § 2060 (1970).

[195] ACUS Rec. 74-4, *supra* note 104, at ¶ 1(4) (adopted May, 1974). The supporting memorandum of the Committee on Judicial Review would limit material not considered by the agency to that "becoming available after the decision to promulgate the rule was made," and asserts that the recommendation does not decide whether the reviewing court should be "limited to the information before the agency." Committee on Judicial Review, Administrative Conference of the U.S., *Supporting Memorandum Re ACUS Rec. 74-4*, ¶ 1(4), May, 1974. *See also* Chrysler Corp. v. Department of Transp., 472 F.2d 659, 669 (6th Cir. 1972) (record on review for purposes of National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392(b) (1970) includes "the technological and statistical data relied upon by the Agency in arriving at its conclusions").

The Administrative Conference has adopted somewhat contradictory positions with respect to what constitutes the record for review. Nothwithstanding its recommendation for broad definition of the record on review, it agrees that in notice-and-comment rulemaking an agency "to the extent feasible" should "make available documents, materials and public submission upon which the proposed rule is based." 2 ACUS Rec. 71-6, *supra* note 104, at 35 (1970-72). Contrast the Conference's retrograde Recommendation 72-5, 2 *id.* at 66, that "in future grants of rulemaking authority . . . , Congress ordinarily should not impose mandatory procedural requirements other than those required by 5 U.S.C. § 553." Partial reconciliation, probably unintended by the Conference, would result from making clear that *Portland Cement* interprets rather than adds to § 553; perhaps it is time the Conference gave the whole problem a fresh look.

[196] 504 F.2d 646, 665 (1st Cir. 1974).

[197] *Id.* at 665-66.

[198] Tagg Bros. v. United States, 280 U.S. 420, 444 (1930) (Brandeis, J.), *cited approvingly in* NBC v. United States, 319 U.S. 190, 227 (1943) (a rulemaking case).

[199] This is clearly contemplated by the Consumer Product Safety Act. The statute

A requirement that rules adopted by an administrative agency be supported by a public record developed in a notice-and-comment proceeding would, of course, depart markedly from the analogy of legislative enactment.[200] While it seems difficult to deny that the development and rebuttal of a factual case to support proposed legislation would often be likely to improve the product, we think the situations distinguishable. It is traditionally acceptable for legislatures, not composed of technical experts, to act informally in the exercise of a judgment essentially more political than factual, to accommodate the clashing interests of diverse groups. The very purpose of statutory delegation to a specialized and expert agency, however, is to obtain a more professional, less political judgment. The statutes emphasize this purpose by laying down standards, often technically exacting, to govern the exercise of rulemaking power, and by imposing procedural formalities—notice, comment and a concise statement of reasons—that are not applicable to the legislature itself. The judicial impulse to convert informal rulemaking into what might be called semi-formal rulemaking—more accurately, rulemaking based upon a record developed through somewhat structured dialogue between the agency and the affected parties—can be viewed as an effort to make the statutory opportunity for comment a meaningful one in light of the statutory purpose. Moreover, significant procedural differences may be dictated by the sheer difference in size between the two decisionmaking bodies. It would obviously not be feasible to demand that a legislature of several hundred members adopt even

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provides for remand when "the petitioner applies to the court for leave to adduce additional data . . . and shows . . . that there were reasonable grounds for the petitioner's failure to adduce such data . . . in the proceeding before the Commission . . . ." 15 U.S.C. § 2060(b) (1970). *See* Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. Rev. 899, 923, 936 n.144 (1973).

The Environmental Protection Agency, stressing that a remand to counter agency information disclosed for the first time in court may postpone the effective date of important regulations, argued against a loose definition of "record" proposed by the Administrative Conference, *see* note 195 and accompanying text *supra*. Requiring disclosure of agency support material during the rulemaking proceeding and limiting the record essentially to matters so disclosed will, the EPA argued, "improv[e] the process of informal rulemaking itself and lessen . . . the need for judicial review" by "facilitating timely and informed comment and increasing the likelihood that hard problems will be addressed before final promulgation," rather than "on remand from a reviewing court." The EPA memorandum, moreover, endorsed the requirements imposed upon it in the *Portland Cement* case: "There seems to be no adequate justification for revealing such material only at the time of final promulgation (much less at the time the record for review is compiled)." EPA, Comments on Proposed ACUS Rec. 74-4, ¶ 1(4): Preenforcement Judicial Review of Rules of General Applicability 14, 22 (1974). Most dramatically, the EPA has integrated the *Portland Cement* procedure into its practice for adoption of effluent guidelines under the water pollution statute, 33 U.S.C. §§ 1251-92, 1311-28, 1341-45, 1361-76 (Supp. III, 1973). *See* 38 Fed. Reg. 21202-06 (1973).

Even if the Administrative Conference gets its way and an agency is permitted to bring before the court new factual material, the desirability of avoiding a remand may discourage remands in any case. *See* Scalia & Goodman, *supra* note 199, at 923.

200. *See* Williams, *Judicial Compulsion of Procedures Not Required by Section 553 in "Notice-and-Comment" Rulemaking* 55-56 (1974) (unpublished draft submitted to the Administrative Conference of the United States): "It seems appropriate that the same device employed (where necessary) to verify the factual underpinnings of legislative acts should be available for a court to verify the factual support of agency rules . . . ."

the "concise general statement" of reasons that the APA requires of rulemaking agencies. Finally, the constitutional dignity of the legislature, its broad-based mandate from, and closeness to, the sovereign electorate, and above all the immediate political checks on irresponsible legislation make tolerable a procedural looseness in Congress that would be less acceptable in an administrative agency.

A requirement that a public record be developed to support rules promulgated by an administrative agency should not, however, be taken to require trial-type hearings for rulemaking. The agency must simply make public its supporting factual information in time for rebuttal; the method of presentation is an entirely separate question.

This requirement may, however, invest rulemaking proceedings with a degree of finality more common to quasi-judicial decisions. Carried to the extreme of requiring challenges within a short period, as in the Clean Air Act,[201] finality can easily cut off important rights of unsuspecting persons—a danger much reduced in adjudication because only the parties are bound. We see similar dangers in limiting review of regulations to persons who participated in the rulemaking proceedings; there is no justification in policy for holding that persons not so participating can only sue in a district court,[202] so long as review is, as we have advocated, limited to the administrative record. Even this limit may cut off legitimate claims that could not reasonably have been anticipated; but if the preservation of reasonably unanticipated claims is thought to justify allowing reexamination of regulations on the basis of new information, we think it more consistent with the theory of delegated rulemaking that the data be first presented, and the initial reassessment made, in the rulemaking agency, not in court.

Further, even under the Consumer Product Safety Act,[203] where the agency may bring before the court materials it did not earlier make public, there may be no need for taking evidence in court as to the validity of a regulation. That statute, in the first place, speaks of "filing" such material as a part of the record, just as if it had been introduced formally before the agency; it does not contemplate presentation by witnesses in open court. And if a party challenging the regulation wishes to rebut the new material, the statute envisions a remand to the agency, not a judicial trial.[204]

Finally, apart from such specific statutory language, the traditional distinction between "legislative" and "adjudicative" facts suggests that oral testimony will not be the standard method of presentation if a court accepts new factual material respecting the validity of a regulation. Professor Davis has stated:

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[201] 42 U.S.C. § 1857h-5(b) (Supp. III, 1973).

[202] *See* Gage v. AEC, 479 F.2d 1214 (D.C. Cir. 1973), construing the Hobbs Act, 28 U.S.C. § 2344 (1970), which allows direct circuit court review by a "party" to a proceeding made reviewable by the Atomic Energy Act, 42 U.S.C. § 2239 (1970), which in turn includes regulations.

[203] 15 U.S.C. §§ 2051-81 (Supp. III, 1973).

[204] *See* note 199 *supra*.

> Adjudicative facts are the facts about the parties and their activities, businesses, and properties. . . . Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion. . . .
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> . . . Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative facts.
>
> . . . and should not be required.[205]

The facts upon which regulations of general applicability are based are likely to be legislative facts in this sense. Professor Karst has forcefully argued for more attention to adequate presentation of legislative facts in constitutional cases and has cited instances in which such matters were established by evidence at trial.[206] The First Circuit's dictum in *South Terminal* indicates that such a presentation would be proper in district court review of a regulation. Yet as Karst points out, it is common practice to establish legislative facts in court, when they are not simply noticed by the court on its own, through such informal means as affidavits or Brandeis briefs. It would hardly be surprising if the same were done with legislative facts in rulemaking cases, especially since no trial is usually required for development of such issues before the agency itself.

The foregoing survey of judicial review of informal rulemaking suggests that the absence of a trial-type record may not present as substantial an obstacle to direct court of appeals review as might appear at first blush. Often the sole issues will involve pure statutory construction. Sometimes a court may still adhere to the old-fashioned view that it may not inquire into the facts. Increasingly, we believe, factual matters will be determined on the basis of material that was before the agency. And if new matter is allowed, it seems likely to be presented either as a part of the "record" relied on below, or before the agency on remand, or as legislative fact in the form of a Brandeis brief. We do not say the occasion for taking evidence in court will never arise.[207]

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[205] K. Davis, Administrative Law Text, § 7.03, at 160 (3d ed. 1972).

[206] Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75. For additional examples, *see* Williams, *supra* note 200, at 55.

[207] In at least one case under the Emergency Price Control Act of 1942, Ch. 26, tit. II, 56 Stat. 31, the Emergency Court of Appeals, after an initial administrative review hearing and not one but two remands, itself heard additional evidence bearing on the validity of a regulation. Heinz v. Bowles, 149 F.2d 277 (Emer. Ct. App. 1945). And in Texas v. EPA, 499 F.2d 289 (5th Cir. 1974) a single member of the appellate panel conducted conferences with counsel to straighten out matters of fact. Professor Steven Williams has called attention to an old Supreme Court case, Houston v. St. Louis Independent Packing Co., 249 U.S. 479 (1919), *cited in* Williams, *supra* note 200, at 53-54, in which the validity of a regulation was determined on the basis of court testimony.

Professor Williams has also noted some pieces of legislative history suggesting that

But on the strength of our examination to date, we think such occasions may be the exception rather than the rule. When they occur they can be dealt with in a variety of ways short of a cumbersome trial before three judges: by conferences as in *Texas* v. *EPA*,[208] by a hearing before a master[209] or perhaps before a single circuit judge,[210] by remand to the agency, or, statute permitting, by transfer to a district court for hearing.[211] Admittedly, any of these procedures would be burdensome in the particular case. If we are right, however, that they will rarely be necessary, it would seem unfortunate to sacrifice the obvious economies of direct review in the many manageable cases in order to avoid an occasional burden.

There are, however, further complications respecting the possible need for judicial factfinding in review of informal rulemaking. First, for reasons noted in connection with review of adjudication, factual issues relating to motions for interim relief can be handled by requiring the agency to pass first upon such motions, or by reference to a master, or by summary proceedings before the appellate court itself.[212] Second, although facts outside the agency record may be relevant to a determination of standing,[213] an issue largely foreign to review of quasi-judicial orders, the usual dispute, one suspects, concerns not the

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Congress in enacting the APA contemplated judicial evidence-taking as a matter of course to determine the validity of non-record regulations:

> Where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court.

H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), *quoted in* Williams, *supra* note 200, at 52. *See also* S. Rep. No. 572, 79th Cong., 1st Sess. (1945). This statement purported to explain 5 U.S.C. § 706(2)(f) (1970), which provides in relevant part:

> The reviewing court shall . . . set aside agency action, findings and conclusions found to be . . . unwarranted by the facts to the extent the facts are subject to trial de novo by the reviewing court.

Regardless of the committee's intention, this provision appears not to prescribe when a trial is to be had, but only to indicate the scope of review when some other law prescribes trial de novo. In any case, the imposition of procedural requirements looking toward development of a non-adjudicative record, as in the *Portland Cement* case, has substantially undermined the premise of the committee position, and Professor Williams affirms "the apparent rarity of judicial trial" of facts relating to validity. Williams, *supra* note 200, at 55.

[208] 499 F.2d 289 (5th Cir. 1974).

[209] For the comparable problem of ascertaining facts in a proceeding for contempt in the court of appeals, *see* notes 41-51 and accompanying text *supra*.

[210] Unlike the three-judge district court, 28 U.S.C. § 2284 (1970), the circuit court is not clearly disabled by statute from delegating the evidence-taking function to a single judge. *But see id.* § 46(b) (authorizing "hearing" as well as "determinations" of cases by three circuit judges). *Cf.* Texas v. EPA, 499 F.2d 289 (5th Cir. 1974).

[211] 28 U.S.C. § 2347 (1970) ("when a hearing is not required by law and a genuine issue of material fact is presented"). The same section authorizes a reference to the agency for additional evidence where there are "reasonable grounds for failure to adduce the evidence before the agency."

[212] *See* notes 41-51 and accompanying text *supra*.

[213] *Cf.* SCRAP v. United States, 412 U.S. 669 (1973).

extent of the plaintiff's interest but its legal sufficiency, a subject for argument not proof.

More important, the discussion so far has assumed that the regulation is attacked on its face, while it may be possible for an affected person to challenge the validity of a regulation as applied to his individual situation.[214] Individualized facts—for example, the absence of space at the petitioner's plant to install a pollution-control device—are not likely to have been brought before the agency; it would be cumbersome to provide a hearing on all such questions within the rulemaking process. Moreover, the facts giving rise to a claim of individual hardship are almost by definition "adjudicative" rather than "legislative," so that a trial-type hearing—such as is seldom afforded in rulemaking—may be constitutionally required.[215] One court has concluded that such challenges may be brought in a court of appeals,[216] another court, noting the impracticability of providing an adequate hearing on individual claims during rulemaking, disagreed.[217] If this latter view prevails, review of agency regulations will be bifurcated: Facial validity will be determined by the circuit courts, validity as applied by the district courts.

That neither the rulemaking process nor the appellate court is well-equipped to determine the facts bearing on applicability of a regulation to individual cases seems manifest; the practical significance of this problem in determining the appropriate forum for judicial review, however, is less clear. Truly individualized facts should as a matter of statutory construction rarely render a regulation invalid as applied: The very purpose of a regulation is to avoid the necessity of determining the appropriate rule on a case-by-case basis. Section 111 of the Clean Air Act, for instance, prescribes that new-source performance standards "reflect the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."[218] One would hardly expect the EPA to make a plant-by-plant determination as to the best practicable control technology in setting such a standard.[219] On the other hand, determining

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[214] Getty Oil Co. v. Ruckelshaus, 342 F. Supp. 1006 (D. Del. 1972), *rev'd in part on other grounds*, 467 F.2d 349 (3d Cir. 1972); Buckeye Power, Inc. v. EPA, 481 F.2d 162, 173 (6th Cir. 1973); Gage v. AEC, 479 F.2d 1214, 1218-19 (D.C. Cir. 1973).

[215] *See* Londoner v. Denver, 210 U.S. 373 (1908).

[216] Getty Oil Co. v. Ruckelshaus, 324 F. Supp. 1006 (D. Del. 1972).

[217] Buckeye Power, Inc. v. EPA, 481 F.2d 162, 173 (6th Cir. 1973).

[218] 42 U.S.C. § 1857c-6(a)(1) (Supp. III, 1973).

[219] *Cf.* Heinz v. Bowles, 149 F.2d 277, 281 (Emer. Ct. App. 1945), where the court interpreted a statute requiring maximum prices to be "generally fair and equitable":

> If the price enabled most of the non-processing slaughterers to operate profitably, the regulation would not be rendered invalid by the fact that an occasional marginal producer in the group could not stay in business under the established ceilings.

Indeed, when individual hardship is deemed to excuse one from compliance, statutes commonly provide a quasi-judicial variance procedure in which the expert agency may whether whole classes of emission sources require separate treatment[220] involves legislative facts and is the very sort of question with which the rulemaking process is designed to deal. Thus, the danger that individual facts may have to be established in a court of appeals to determine the validity of a regulation as applied may be more theoretical than real; many such contentions can appropriately be disposed of by the equivalent of a demurrer without trial.

In short, unless the court takes what we think would be the unusual and misguided step of allowing new factual evidence on the issue of facial validity, the occasions for factfinding in pre-enforcement review even of informal rulemaking seem likely to be relatively minor. We are strengthened in this conclusion by the fact that the agencies responding to our questionnaire report that direct review of regulations has caused no practical problems.[221] If other considerations cut strongly in favor of direct appellate review of such regulations, it may be inappropriate to let the tail wag the dog by requiring a trial court forum rather than allowing a modicum of awkwardness at the appellate level.

The most compelling argument for bypassing the trial courts in rulemaking cases is that regulations of general applicability, almost by definition, are relatively more significant than individual adjudications. Affecting often an entire industry or class of persons, the question of the validity of such regulations is quite likely to end up in a court of appeals anyway. Unless factfinding requirements substantially discommode the circuit courts, it makes sense to avoid the delay and expense of prior district court litigation.[222] This

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determine the facts. *E.g.*, 42 U.S.C. § 1857c-5(f) (Supp. III, 1973) (air pollution). Exhaustion of such an administrative remedy should perhaps be a prerequisite to judicial attack on a regulation as applied. *See* Commonwealth Edison Co. v. Pollution Control Bd., Ill. App. 3d , NE.2d , (1st Dist. 1974) (limiting direct appellate review of regulations to questions of facial validity: confining individual hardship cases to seeking variances from the agency).

[220] *E.g.*, Heinz v. Bowles, 149 F.2d 277, 281 (Emer. Ct. App. 1945) (invalidating application of meat-price regulation to non-processing slaughterers because "a common economic situation . . . sets them apart from the rest of the industry").

[221] *See* letters to Antonin Scalia, Chairman of the Administrative Conference from General Counsel Office of the AEC, Oct. 7, 1974, Dep't of Transportation (highway safety), Oct. 30, 1974, and Consumer Product Safety Commission, Nov. 18, 1974. As the CAB has pointed out, circuit courts sometimes must review the validity of regulations without benefit of district court factfinding when regulations are challenged on appeal from a quasi-judicial enforcement order. *See* letter from Thomas J. Heye, CAB General Counsel, to Antonin Scalia, Chairman of Administrative Conference, Oct. 18, 1974, *citing* Great Lakes Airlines, Inc. v. CAB, 291 F.2d 354, 367 (9th Cir. 1961) (the agency's trial examiner had excluded evidence going to the validity of the regulations; the court said that if facts were necessary a remand would be in order but held the regulations valid as a matter of law).

[222] The CAB, arguing that "interposing a district court proceeding between agency decision and appellate decision has achieved nothing but delay," has asked Congress to make its regulations reviewable by the circuit courts under the Hobbs Act, 28 U.S.C. § 2344 (1970). *See* letter from Thomas J. Heye, CAB General Counsel, to Antonin Scalia, Chairman of Administrative Conference, Oct. 18, 1974; S. 2609, 92d Cong., 1st Sess. The Federal Reserve Board has asked the courts to hold its regulations "orders" subject to direct appellate court review under the Bank Holding Company Act, 12 U.S.C.

may be especially important when Congress deems time to be of the essence, as it did with wartime price regulations and more recently with air and water pollution.

3. *Appraisal of Other Objections.* The problem of bifurcated review in the area of informal rulemaking cuts both ways for many agencies. On the one hand, there is the often-voiced objection[223] that it is undesirable to have orders reviewed by the appellate court and regulations by the district court, as is the case under many current decisions. On the other, there is the likelihood that the validity of regulations may in any event be determined by trial courts in enforcement actions that cannot very well be brought in a circuit court because of the frequent need for a fact hearing on the question of violation. One answer would be, as in the Clean Air Act, to forbid the raising of invalidity as a defense;[224] this is a harsh measure that may trip the unwary litigant who did not suspect the regulation was meant to apply to him, and we do not recommend it absent the most stringent necessity—as, for example, in the case of price control—for expeditious final determination.[225] Nor would we recommend certification of validity questions in enforcement proceedings to the appellate court,[226] for that would split a single case between two forums, with consequent delay and expense.[227] The only other way to avoid all bifurcation would be to make not only regulations, but all orders, reviewable in the district courts; but that would impose substantial additional burdens on courts and litigants alike. All of these alternatives seem to us much worse than a little bifurcation; after all, the circuit courts can review determinations of validity made in enforcement cases, so any disuniformity or other damage done by bifurcated review will be short-lived.

The concurring opinion in *Texas* v. *EPA*,[228] calling for district court review of regulations, seems to have focused not only upon the role of the trial judge in the taking of evidence but also upon his role as fact sifter. The thesis seems to be that, quite apart from the necessity of a hearing, judicial economy is served and an ultimately correct decision made more likely if a

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§ 1848 (1970). *See* letter from Thomas J. O'Connell, General Counsel of the Federal Reserve Board, to Antonin Scalia, Chairman of the Administrative Conference, Oct. 10, 1974.

[223] *See, e.g.*, L. JAFFE, *supra* note 4, at 423; Mullan, *The Federal Court Act: A Misguided Attempt at Administrative Law Reform?*, 23 U. TORONTO L.J. 14, 16, 29 (1973).

[224] 42 U.S.C. § 1857h-5(b) (Supp. III, 1973).

[225] *See* Yakus v. United States, 321 U.S. 414 (1944) (wartime need for expedition in price control).

[226] Such certification is required for substantial constitutional questions arising in enforcement cases under section 211 of the Economic Stabilization Act of 1970 (Temporary Emergency National Court of Appeals), 12 U.S.C.A. § 1904 (Supp. 1974) *as amended*, Act of Aug. 24, 1974, Pub. L. No. 93-387, § 211, 88 Stat. 750. *See, e.g.*, DeRieux v. The Five Smiths, Inc., 499 F.2d 1321 (Temp. Emer. Ct. App. 1974).

[227] *Cf.* Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960) (the delays attending the practice of abstention by federal courts to ascertain state views on state law).

[228] 499 F.2d 289, 321-22 (5th Cir. 1974); *see* text accompanying notes 160-62 *supra*.

trial judge first undertakes the formidable task of organizing and understanding very complex and informal factual records. A mammoth case such as that one, involving the validity of a variety of provisions of Texas's plan for implementing air-quality standards, obviously imposes a considerable burden on any court. While this very complexity makes it all the more imperative that the appellate court ultimately decide, it does not require that three judges do the preliminary digging. But there is no indication that this is what happened in *Texas*; the complaint is that the burden was great for the writing judge. To the extent that the argument is that prior district court scrutiny facilitates correct appellate decision, we recognize the force of the point. The Supreme Court surely benefits when difficult issues have first been tackled by the circuit courts. The question remains whether in rulemaking cases the gain from the input of a single district judge is great enough to justify the added burden. It should be borne in mind that not all rulemaking cases are as complex on their facts as *Texas* v. *EPA*.

This observation brings to mind a related one: Not all regulations are of equal general importance. To provide for direct review of all regulations because some of them are of great import would be overhasty; it might risk burdening the courts of appeals with a myriad of trivial cases that might better end in the district courts. Once again, the uncertainties and burdens of jurisdictional litigation counsel against simply making "important" regulations directly reviewable upon individual determination of importance, as they counsel against the District of Columbia Circuit's apparent position[229] that the proper forum turns on the necessity for judicial factfinding in the individual case. The best approach would seem to be for Congress to consider separately each category of regulations with a view toward ascertaining whether they are likely to be of sufficient importance to justify bypassing the district courts. In this light, it would seem to make eminent sense that the circuit courts have original review authority over such broad and significant regulations as those setting national air-quality standards or the emission standards for achieving them.[230] In such cases, it should be added, the probability and desirability of further review in the circuit courts strongly argues that those courts would not be substantially relieved if such cases were initially reviewed in the trial courts.

C. *Informal Adjudication*

This amorphous and miscellaneous category, constituting "the vast bulk of administrative adjudication,"[231] is defined by a characteristic highly relevant to the choice of a trial or appellate forum for review: the absence of a record based upon a formal adjudicatory hearing. Subject to that constraint, the myriad types of adjudication vary almost infinitely in procedural characteristics—in opportunity for input by interested parties, scope and thoroughness of administrative investigation, nature of the administrative record, if any, and so on. They range from unstructured discretionary decisions of enforcement agencies whether to prosecute to quasi-formal decisions of the Comptroller of the Currency—governed by specific statutory criteria, after extensive investigation, and upon information received informally from all interested parties—whether to grant a bank charter.[232] This alone would make useful generalization concerning the appropriate forum for review extremely difficult. The difficulty is compounded, however, by our general lack of knowledge about the nature of the beast. In contrast to the formal processes of administrative action, the "procedures which govern informal action by the Government have until the last few years received almost no attention,"[233] and most of this complex and diverse terrain remains unexplored. The question of the appropriate forum depends upon more basic variables—such as the nature of the issues typically raised on review, the character of the administrative record, and the procedures available to the reviewing court to supplement that record when necessary—all of which are themselves highly uncertain. The state of our knowledge with respect to the relevant administrative practices, and the state of the law with respect to the permissible judicial techniques are alike fluid and developing.

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[229] Deutsche Lufthansa A.G. v. CAB, 479 F.2d 912 (D.C. Cir. 1973).

[230] As now provided in 42 U.S.C. § 1857h-5(b) (Supp. III, 1973).

[231] ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REP. 35 (1951), *cited in* Gardner, *The Procedures By Which Informal Action is Taken*, 24 AD. L. REV. 155, 156 (1972).

The informal orders of agencies which do little or no formal adjudication are ordinarily reviewed in district courts in suits for declaratory or equitable relief under the general review provisions of the APA. The jurisdictional situation is less clear, however, in the case of agencies whose main business is formal adjudication and some or all of whose "orders" are reviewable in circuit courts under specific statutory review provisions. In *FPC v. Metropolitan Edison Co.*[234] the Supreme Court held that such a provision applies only to formal orders. The statute provided for review of orders arising out of "proceedings under the Act" and required a transcript of the record to be filed with the appellate court.[235] The Court ruled it inapplicable to an order commencing an investigation to determine "the ownership, operation, management, and control" of the plaintiff company. Not content to hold the order nonreviewable because of its "procedural" and "preliminary" character, the Court further declared that the statutory "orders" were limited "to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."[236] In this aspect, however, *Metropolitan Edison* has not generally been followed. Regulatory orders, for example, suspending[237] or refusing to suspend[238] a proposed rate, or accepting a proposed rate for filing,[239] have been held reviewable by circuit courts even in the absence of a formal record. The appellate courts tend to approach the jurisdictional question in an ad hoc, pragmatic way, as two decisions of the District of Columbia Circuit illustrate.

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[232] *See* Camp v. Pitts, 411 U.S. 138 (1973), *discussed at* notes 253-54, 258 and accompanying text *infra*.

[233] Gardner, *supra* note 231, at 156.

[234] 304 U.S. 375 (1938).

[235] 16 U.S.C. § 825*l*(b) (1970).

In *Environmental Defense Fund, Inc. v. Hardin*[240] the court accepted jurisdiction to review the Secretary of Agriculture's refusal to act on a request that he suspend the registration of DDT pending a cancellation proceeding. Review of this important interlocutory order was surely appropriate since later review would be of no use. Since there was no administrative record, it was argued that mandamus in the district court was the sole remedy, although the final order in the cancellation proceeding would be taken to the court of appeals. The court disagreed:

> There is some authority . . . that only a trial court is capable of reviewing orders issued without the benefit of formal factfinding based on a record. That view has been criticized, however, for dividing between two courts the review of the various orders involved in a single administrative proceeding. Whatever its continuing vitality, that line of authority is especially inappropriate here, where the facts in issue lie peculiarly within the special competence of the Secretary. The district court could do no more than remand to the Secretary, as we do here . . . .[241]

Recognizing that "meaningful judicial review" would be impossible without more of a record, the court remanded the case to the Secretary for a fresh determination or a statement of reasons.

In *Medical Committee for Human Rights v. SEC*[242] the same court entertained a challenge to the SEC's decision not to prosecute an alleged violation of its proxy rules. There had been no adjudicatory hearing; the action was not, as in *Hardin*, ancillary to any pending or potential formal proceeding; and the substantive questions could have been raised in a private action in a district court. The court of appeals, however, was held the "more appropriate" forum because the petitioner "does not seek to contest any matters of fact which would require a trial de novo."[243]

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[236] 304 U.S. at 384.

[237] Phillips Petroleum Co. v. FPC, 227 F.2d 470, 475 (10th Cir. 1955), *cert. denied sub nom.* Michigan Wisconsin Pipe Line Co. v. Phillips Petroleum Co., 350 U.S. 1005 (1956).

[238] Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied sub nom.* Federal Maritime Bd. v. United States, 347 U.S. 990 (1954).

[239] Cities Service Gas Co. v. FPC, 255 F.2d 860, 862-63 (10th Cir.), *cert. denied sub nom.* Magnolia Petroleum Co. v. Cities Service Gas Co., 358 U.S. 837 (1958).

[240] 428 F.2d 1093 (D.C. Cir. 1970).

[241] *Id.* at 1098-99.

[242] 432 F.2d 659 (D.C. Cir. 1970).

The absence of a formal adjudicatory record justifies, we think, a presumption in favor of district court review. Without such a record, a judicial trial will very often be necessary to determine either the basis upon which the administrator acted or the facts relevant to an evaluation of his action. Furthermore, even where the issues raised are strictly legal, a district court opinion may, in the absence of a formal opinion at the administrative level, be useful to the circuit court in organizing the case for appellate review.

To be sure, we suggested earlier[244] that, in general, notice-and-comment rulemaking should be reviewed in courts of appeals despite the absence of a trial-type hearing record, and that if further factfinding became necessary the appellate court could refer the case to a district court, a master, or the agency itself. The same treatment might be thought equally appropriate for informal adjudication. There are, however, at least three pertinent differences, of degree if not of kind, between the two types of informal action.

First, review of rulemaking more often presents questions of law or questions of legislative fact that can be resolved on the basis of Brandeis briefs; conversely, adjudication usually hinges on questions of specific fact that may have to be tried. Second, while the APA prescribes no procedures at all for non-record adjudication, it does impose a degree of structure upon the rulemaking process.[245] The requirements that interested persons have an opportunity at least for written comment and that the agency provide a general statement of reasons virtually assure that an appellate court will have a meaningful record to review. While it is true that in many instances informal adjudication also produces an administrative record, the nature and scope of the records vary widely from one type of action to another and cannot provide the same assurance that appellate review will be feasible. Finally, review of rulemaking much more often involves questions of general importance or broad impact, questions that will eventually be brought to the appellate courts in any event and cannot be postponed without major social costs. Review of informal adjudication, on the other hand, is more likely to affect only the immediate parties and in most cases would not be appealed beyond the district courts.

The distinctions we have drawn do not cut cleanly. Informal adjudication, we repeat, frequently does generate an administrative record suitable for the purpose of review. Moreover, scholars and practitioners of administrative law are coming to recognize a need for greater procedural regularity in the field of informal agency action.[246] The reforms they contemplate—including a requirement that the administrator state the facts and reasons upon which he bases his decision[247]—would, as a byproduct, yield more adequate records.

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[243] *Id.* at 672.
[244] *See* notes 167-222 and accompanying text *supra.*
[245] 5 U.S.C. § 553 (1970).
[246] Gardner, *supra* note 231.

Furthermore, deficiencies in the administrative record which make it unsuitable for review can often be remedied without resort to a judicial trial. The *Hardin* case is sufficient illustration. It is true that the court's decision to remand the case to the Secretary for a statement of reasons, and its assumption that a district court would have had no choice but to do the same, is somewhat inconsistent with the approach taken by the Supreme Court two years later in *Citizens to Preserve Overton Park, Inc. v. Volpe*.[248] The Court remanded to the district court to determine, either by testimony or affidavits, the "factors that were considered" by the Secretary of Transportation or his "construction of the evidence"[249] in deciding, without a hearing or formal administrative findings, that there was no "feasible and prudent alternative" to building a highway through a park.[250] *Overton Park* makes clear, however, that the absence of formal administrative findings or reasons does not necessarily call for a remand to the agency.[251] Applying the same approach in *Hardin*, the District of Columbia Circuit might have disclaimed jurisdiction on the ground that the district court was the appropriate forum in which to obtain an explanation for the Secretary's refusal to suspend DDT. Yet it might equally have concluded that if the explanation for the Secretary's action was to be elicited by affidavit or testimony, rather than by a remand to the agency, district court review would be superfluous, for a court of appeals is no less able than a district court to secure the production of such evidence. This conclusion was impossible in *Overton Park*, not only because of the absence of a statute giving courts of appeals jurisdiction to review orders of the Secretary of Transportation, but also because the question of whether the Secretary had made an independent judgment or merely rubber stamped a decision of the local city council was a disputed matter possibly requiring oral testimony and cross-examination. Normally, one assumes, an administrator's own explanation of the grounds upon which he acted, "post hoc" rationalization though it may be, would be accepted at face value and could be adequately communicated by affidavit.

Findings and reasons, however, are not the only prerequisite to meaningful judicial review; the court may also need some factual basis on which to evaluate them. This poses no serious problem for circuit court review in cases where an extensive administrative record exists in the form of written materials that can be packaged and filed in the reviewing court as easily as a hearing transcript. The difficulties arise in cases where the record, if there is one, is less complete, or less tidy, or where the question of what information was before the administrator when he acted is disputed or uncertain. In such cases, a judicial trial may sometimes be necessary in order to reconstruct the administrative record.

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[247] *Id.* at 164.
[248] 401 U.S. 402 (1971); *see* notes 170-73 and accompanying text *supra*.
[249] *Id.* at 420.
[250] *Id.* at 405.
[251] *Id.* at 409.

In evaluating the frequency with which a judicial trial may be necessary, a key consideration is the extent to which agency action can properly be sustained or challenged on the basis of evidence, judicially adduced, that was not before the agency when it acted. If such evidence is ruled out, and the trial limited to a reconstruction of the administrative record, district court review will obviously be needed much less often. In *Overton Park*,[252] and later more explicitly in *Camp v. Pitts*,[253] the Supreme Court indicated that in determining whether an order is arbitrary or capricious, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."[254] This position is in keeping with the traditional understanding that "the reviewing function is one ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it was based."[255] Yet it is hard to take these statements entirely at face value. In the class of situations with which we deal, the party tendering new evidence may have had no opportunity to be heard at the administrative level. To deny him that opportunity in court might be a violation of due process.[256] Even if not, it would often reduce judicial review to a rubber stamp, especially where the proffered evidence tended to expose the administrative record as a product of superficial and inadequate investigation. To uphold the administrator's action merely because it is supported by such a record would be to reward him for wearing blinders. In *Overton Park*,[257] and again in *Camp*,[258] the Court acknowledged that new evidence may be appropriate where the agency's factfinding procedures are inadequate, and this exception may ultimately be held to encompass situations where the agency has acted ex parte and without sufficient effort to inform itself.[259]

Even if one assumes that the administrative record may on occasion be supplemented by new evidence, it does not follow that this must be done through a judicial trial. Alternatively, the reviewing court could, as in *Hardin*, remand to the agency for a fresh determination in light of the additional information brought to the court's attention. This approach has the advantage of enabling the agency to evaluate the new evidence for itself and would reduce the risk of a judicial substitution of judgment. If frequently employed, however, the remand technique could force the agencies to adopt burdensome factfinding procedures that Congress did not see fit to impose and that could seriously impair the efficiency of the administrative process. We do not attempt to resolve these questions of appropriate procedure. Our purpose is merely to note that on certain procedural assumptions courts of appeals will often be able to perform the reviewing function effectively despite deficiencies in the record.

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[252] *Id.* at 420. Upon remand in *Overton Park*, the district court conducted a 25-day trial in which it received voluminous evidence, much of it not contained in the original administrative record, bearing on the Secretary's conclusion that no alternative route was feasible. Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873 (W.D. Tenn. 1973). The court indicated, however, that its decision would be based exclusively on the administrative record that was before the Secretary at the time he acted. *Id.* at 882.

[253] 411 U.S. 138 (1973).

[254] *Id.* at 142.

[255] United States v. Carlo Bianchi & Co., 373 U.S. 709, 714-15 (1963).

[256] *See* Londoner v. Denver, 210 U.S. 373 (1908). *See also* note 215 and accompanying text and note 43 *supra*.

[257] 401 U.S. at 415.

[258] 411 U.S. at 141-42.

[259] In a variety of situations, federal courts reviewing informal administrative action have admitted new evidence augmenting the administrative record. *See, e.g.*, Brown v. United States, 396 F.2d 989, 991-94 (Ct. Cl. 1968) (Davis, J.).

Our analysis yields no easy generalizations concerning the frequency with which a trial in the district court may be necessary. Until we know much more than we do, it would be premature to recommend wholesale, or even retail, departures from the existing statutory preference for district court review. But just as we do not say that all informal rulemaking should be reviewed in appellate courts, neither do we say that all informal adjudication should be reviewed in district courts. Further study may reveal categories of informal action in which the need for judicial trial, and the added burden upon the courts of appeals, are sufficiently small to warrant a statutory assignment of jurisdiction to the appellate courts.

One class of informal action that immediately comes to mind as a category, or source of categories, for court of appeals review is the occasional informal orders of agencies that mainly adjudicate formally and have statutory review provisions placing their "orders" in the courts of appeals. Informal action by such an agency is often ancillary to a pending or prospective formal proceeding, and district court review, aside from its other inefficiencies, could have the added disadvantage of dividing a single proceeding between two courts.[260] Not all informal action by formal adjudicatory agencies has this ancillary character—for example, the order complained of in *Medical Committee* may have been altogether remote from the area of formal agency adjudication. Furthermore, even when an informal order does fall within the general subject matter arena in which the agency formally adjudicates, it may be unrelated to any ongoing or imminent formal proceeding. As we have said,[261] the mere fact that the district court, in reviewing an informal order, may have to decide a legal issue that would ordinarily come to the court of appeals review of a formal order does not seem a particularly troublesome form of bifurcation, since the district court's decision can in any event be appealed. These considerations suggest as one possible statutory approach, that the standard court of appeals review provisions be construed or revised to cover informal orders ancillary to a pending or imminent formal proceeding. Alternatively, the statutory "orders" reviewable in the appellate courts might, contrary to *Metropolitan Edison,* be defined to include informal as well as formal orders. The latter option seems preferable, not only because it avoids the jurisdictional ambiguities that lurk in the notion of ancillariness, but also because it makes good sense for informal orders to be reviewed by appellate judges who presumably have acquired a subject matter expertise in the regulatory area in question.

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[260] *See* L. JAFFE, *supra* note 4, at 422.

[261] *See* notes 223-27 and accompanying text *supra*.

For most agencies, the class of orders that would come directly to the appellate courts under this approach are not numerous and typically involve important enough interests to be appealed in any event. Those instances, probably rare, in which the record is inadequate could be handled by reference to a master, to the agency itself, or, statute permitting, to a district court. There are, to be sure, some exceptions. The informal, highly discretionary orders of district directors of immigration in deportation-related matters falling outside the framework of the formal deportation proceeding typically involve questions of specific fact affecting only the immediate parties and are rarely appealed. For this and other reasons we have already discussed,[262] we do not share the view of Professors Davis[263] and Jaffe[264] that these orders should be added to the exclusive jurisdiction of the courts of appeals.

Whatever its ultimate form, a category-by-category approach to the question of appropriate forum seems to us preferable to the ad hoc approach of the District of Columbia Circuit in *Hardin* and *Medical Committee.* Under the latter, jurisdiction would apparently depend on a determination in each case as to whether factual questions demanding additional evidence were raised. No doubt such a test would shorten the road to ultimate appellate resolution, but only at the cost of uncertainty and jurisdictional litigation;[265] no one suggests that a similar approach be adopted in civil actions generally, though to do so would avoid delay in appeal cases where the facts do not have to be tried.

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[262] *See* notes 109-27 and accompanying text *supra.*

[263] K. DAVIS, *supra* note 43, § 23.03, at 798-99 (1970 Supp.).

[264] L. JAFFE, *supra* note 4, at 422.

[265] The uncertainty problem arises only on the assumption that district court and appellate court jurisdiction are mutually exclusive, so that a district court would be forced to disclaim jurisdiction in cases not requiring a trial and therefore amenable to immediate appellate review. Uncertainty and judicial conflict would disappear, on the other hand, if the district courts, too, adopted the pragmatic policy of accepting jurisdiction in all instances where rerouting the parties appears to serve no practical purpose in the particular case. The result—a de facto system of concurrent jurisdiction—would be contrary to the congressional intent, however, that circuit court jurisdiction be exclusive with respect to "orders" within its domain and might also provide fertile opportunities for forum-shopping.

II. Specialized Courts and Exclusive Venue

In France and other continental countries, administrative actions are reviewed by separate tribunals or courts.[266] In the British Commonwealth, the idea of separate administrative courts or divisions is spreading.[267] In this country Congress has on isolated occasions created narrow specialized courts to review specific kinds of administrative action and has localized review of other administrative actions in a single court of appeals.

The Court of Customs and Patent Appeals, as it is now known, was created in 1909 to hear challenges to tariff determinations;[268] in 1929 it was given nonexclusive jurisdiction to review Patent Office determinations on patent applications and between competing applicants in interference proceedings.[269] The Commerce Court, abolished three years after its creation in 1910, was given exclusive jurisdiction to review ICC railroad orders.[270] Congress vested exclusive jurisdiction to determine the validity of price regulations during the Second World War in the Emergency Court of Appeals,[271] and made a somewhat comparable provision for substantial constitutional questions under the 1970 price control legislation.[272] The Court of Claims has jurisdiction, exclusive in cases involving over $10,000, of contract and certain other claims against the United States.[273] The Tax Court has nonexclusive jurisdiction to determine challenges to tax assessments.[274] The Court of Military Appeals has review power, exclusive except for limited collateral attack over court-martial convictions.[275] Exclusive jurisdiction over FCC license denials and over EPA regulations setting air-quality standards or new source performance standards (among other examples) is in the Court of Appeals for the District of Columbia Circuit.[276]

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[266] The French Conseil d'Etat and the inferior Tribunaux Administratifs have exclusive jurisdiction over "acts of the administration"; other matters are litigated in the ordinary civil courts. Similar systems are found, for example, in Belgium, Italy, and West Germany. *See generally* L.N. Brown & J. Garner, French Administrative Law (2d ed. 1973).

[267] New Zealand created an Administrative Division within its Supreme (trial) court in the Judicature Amendment Act, N.A. Stats. 1968, No. 18. *See also* (N.Z.) Public and Administrative Law Reform Comm., 5th and 6th Reports (1972, 1973). A committee appointed by the Australian Attorney General has recommended the creation of a single administrative tribunal to review administrative decisions closely and a federal administrative court to exercise over it a more limited supervisory power. Commonwealth Administrative Review Committee, Report, Austr. Parl. Paper No. 144 (1971). Rejected by the Franks Committee in Great Britain in 1957, Committee on Tribunals and Enquiries, Report, Cmd. No. 218, at 25-29 (1957), the idea of an administrative court or division is under restudy there. *See id.* 4059 (1969). In Canada, administrative review responsibilities, previously scattered among provincial courts, were recently consolidated in a single two-tier Federal Court with relatively few other significant duties. Federal Court Act 1970, 19 Eliz. 2 c. 1 (Can.).

[268] Act of Aug. 5, 1909, ch. 36, § 29, 36 Stat. 105. Initial reviewing power is now vested in the Customs Court, with a further right of appeal to the Court of Customs and Patent Appeals. *See* 28 U.S.C. §§ 1582, 1541 (1970).

[269] Act of March 2, 1929, ch. 488, 45 Stat. 1475. *See* 28 U.S.C. § 1542 (1970).

[270] Act of June 18, 1910, 36 Stat. 539, *repealed by* Act of Oct. 22, 1913, 38 Stat. 208, 219.

[271] Act of Jan. 30, 1942, ch. 26, § 204, 56 Stat. 31.

[272] Economic Stabilization Act of 1970, *as amended*, §§ 211(b), (c), 12 U.S.C.A. § 1904 note (Supp. III, 1973), *as amended*, Act of Aug. 24, 1974, Pub. L. No. 93-387, §§ 211(b), (c), 88 Stat. 750 (*noted in* 12 U.S.C.A. (Supp. 1974)).

[273] 28 U.S.C. § 1491 (1970); *see also id.* § 1346(a)(2).

[274] 26 U.S.C. § 6213(a) (1970); *see also* statutes *cited in* note 273 *supra*.

A. *Advantages*

Examination of the history of specialized courts suggests three principal advantages over the prevailing American practice of review in the ordinary courts. It can produce judges more familiar with administrative issues in general and with individual administrative programs in particular, thus improving the quality of decision. By minimizing actual and potential intercourt conflicts, it can reduce or eliminate disuniformity and uncertainty in the law administered by the several agencies and the attendant forum shopping. And it can relieve the burden on the ordinary courts, thus improving the conditions for decisionmaking in both administrative and nonadministrative cases. These advantages would not be without corresponding costs, as we shall see below. First, however, we shall examine the three hypothesized advantages.

1. *Relief for the Regular Courts.* Relieving the caseload of the regular courts was apparently one explicit reason for the creation of the Court of Customs Appeals in 1909. The Second Circuit was "swamped" with a multitude of challenges to tariff determinations, causing delay in the resolution of tariff cases and "a serious obstruction to the disposition of . . . traditional litigation."[277] Later the same court was given patent jurisdiction in order to relieve the burden on the D.C. Circuit.[278]

It is now generally accepted that the regular federal courts, and especially the courts of appeals, are critically overloaded.[279] To solve this problem by adding judges or circuits would, it is said, merely create new problems. Already the danger of intracircuit conflicts, the unwieldiness of enlarged en banc proceedings, and the lack of collegiality characteristic of existing courts of 13 or 15 judges have led to recommendations for doubling the number of circuits. Yet there are dangers in the multiplication of circuits too.[280]

The seriousness of the overload problem is largely beyond the scope of the present paper, but we add a caveat. It is fashionable to assume that recent upward trends in docket entries will continue, but predictions ought to be based upon more sophisticated subject-by-subject analysis.[281] As an example, one must take care in basing projections upon the fact that direct appeals to the Ninth Circuit from EPA determinations rose suddenly to the staggering sum of 219 in the first half of fiscal 1974.[282] The EPA has been going through a crash period of adopting regulations and approving implementation plans under a brand-new statutory scheme with tight rulemaking deadlines; and review of its actions must be sought within 30 days. Such challenges can be expected to trail off almost as suddenly as they appeared.

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[275] 10 U.S.C. § 867 (1970). For the confusing scope of habeas corpus *see* D. CURRIE, *supra* note 6, at 164-211.

[276] 47 U.S.C. § 402(b) (1970); 42 U.S.C. § 1857h-5(b) (Supp. III, 1973).

[277] F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 149-51 (1928).

[278] Nathanson, *The Administrative Court Proposal*, in 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 198, 211 (1970-72).

[279] *See, e.g.*, H. FRIENDLY, *supra* note 10.

[280] *See* note 86 *supra*.

[281] *See* Casper & Posner, *The Supreme Court's Caseload*, 3 J. LEGAL STUDIES 339 (1974).

In any event, to the extent that present or projected caseloads impair or threaten to impair the quality of adjudication, any significant relief must be regarded as a substantial gain. Creation of a separate court or courts to handle administrative cases would directly further this objective, essentially by permitting the appointment of more judges without bloating the circuit courts or multiplying the circuits. A 10 percent reduction in cases, for example, would be tantamount to appointing 10 new circuit judges.[283]

Care must be taken, however, to avoid overburdening a new court of administrative appeals. If all administrative cases were transferred to such a court, its docket would immediately approach that of our busiest circuit—the beleaguered Fifth (3,294 cases in fiscal 1974)—in which 15 judges have had to cut corners in order to keep abreast. One way to avoid this would be to give a new court jurisdiction over only as many categories of cases as it could handle with a manageable complement of, say, nine judges. Such a scheme would require monitoring of workloads and continuing jurisdictional adjustments, creating both an administrative burden and the danger of sudden changes in the law as a class of cases is shunted into or out of the new court's jurisdiction. It might therefore be preferable, from this point of view, to create more than one new court, though changing workloads could present similar problems.

A principal difficulty with the overload argument is that it provides no justification for singling out administrative cases for transfer to specialized courts.[284] The same objective could be achieved by separate courts for criminal or diversity cases or for those arising under the Federal Employers Liability Act (FELA). If such alternatives prove politically infeasible or undesirable in substance, then, of course, an administrative court or courts should be considered to the extent that relief is needed for the circuit courts.[285]

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[282] 1974 SEMI-ANNUAL A.O. REPORT, *supra* note 1, at 13.

[283] *See* text accompanying notes 38, 58 *supra*. This estimate assumes that administrative cases are of average difficulty. The THIRD CIRCUIT TIME STUDY, *supra* note 37, rather surprisingly shows administrative cases to average a smaller investment of judge time than other cases, but Judge Leventhal has testified to a subjective conclusion that the opposite is true in spades in the D.C. Circuit. *See Statement of Judge Leventhal*, *supra* note 2, at 9. Obviously, administrative cases are highly variable in difficulty.

[284] A reason for singling out a class of administrative cases for separate treatment might exist if that class in itself imposed an extraordinary burden on the courts, as apparently was true of customs cases before 1909, *see notes* 277-78 and accompanying text *supra*. There are fears that a recent surge in social security cases before the SSA may correspondingly glut the district courts in the near future. *See* notes 64-94 and accompanying text *supra*. But it is no more accurate to attribute the general problems of the circuit courts to administrative cases than to federal question cases not involving the federal government, which clearly outnumber them. *See* 1974 A.O. REPORT, *supra* note 1, table B7.

2. *Certainty in the Law.* Whenever concurrent jurisdiction over a class of controversies is vested in more than one tribunal, the danger arises that conflicting decisions, unless resolved by higher authority, will produce substantive inequality, uncertainty, and, if liberal venue provisions are available, unseemly forum shopping. These considerations have figured prominently in the creation of specialized tribunals here and abroad. The establishment of the Court of Customs and Patent Appeals was preceded by "costly conflicts in decisions" under the tariff laws.[286] The Commerce Court was set up in response to a Presidential message that stressed, among other things, the "great uncertainty" resulting from "contrariety of decision" in various courts reviewing ICC decisions.[287] The Clean Air Act gives the District of Columbia Circuit exclusive jurisdiction to review certain EPA regulations because they "are national in scope and require even consistent national application."[288] The same considerations, among others, have long prompted suggestions for specialized courts of exclusive jurisdiction over tax and patent matters.[289] And in the environmental field, EPA attorneys we interviewed acknowledged that a specialized court would relieve them of their present uncertainty, engendered by conflicting circuit court decisions, as to basic procedures they must follow in passing upon state implementation plans.

From the standpoint of uniformity and certainty, it makes no difference whether one or more new courts are created, so long as subject matter lines do not overlap. But on some types of issues, overlap is almost inevitable. For example, different courts reviewing different agencies might reach divergent results as to common procedural or constitutional questions, or even as to such substantive matters as ratemaking, licensing, or antitrust policy. In any case, it is important for uniformity that the circuit courts be deprived of jurisdiction to decide the relevant questions regardless of the posture in which they arise, whether directly in agency review or by appeal from a district court. If a new court, for example, is to hear pre-enforcement challenges to regulations, it must also hear—either originally, by certification, or on appeal from the district court—any challenges to validity that are permitted to be raised in defense of a civil or criminal enforcement proceeding. Certification from a regular trial court was provided for in connection with recent wage and price controls,[290] but it had the unfortunate effect of requiring litigation of the same case in two forums at the same time and does not seem highly desirable. Original enforcement jurisdiction would make it advisable to create a new trial court as well as an appellate one for more efficient ascertainment of the facts and, at least in criminal cases, would require the new court to sit in the vicinity of the offense. New judges would have to be appointed or to sit in every state. Since the transfer of jurisdiction over matters now heard in the district courts would further expand the jurisdiction of the new court, with consequent impact upon the caseload, appeal from the district courts to the new court would therefore seem far preferable.

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[285] We have not discussed the possibility that a special court or courts might relieve the burden of administrative cases on the district courts. Because the district courts do not to any significant degree function as collegial bodies, there is less objection to relieving their caseloads by the appointment of additional judges. *See* H. Friendly, *supra* note 10, at 28-31. But there presumably must be some limit, if only so that administrative tasks can be managed with some efficiency; and when that limit is approached the same considerations may be weighed as in connection with the circuit courts.

[286] *See* F. Frankfurter & J. Landis, *supra* note 277, 148-52.

[287] *Message of President Taft, quoted* in H.R. Rep. No. 923, 61st Cong., 2d Sess. (1910), *reprinted* in 2 B. Schwartz, The Economic Regulation of Business and Industry 1031-32 (1973).

[288] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 (1970). *See also* Mullan, *supra* note 223.

[289] *See* H. Friendly, *supra* note 10, at 153-71.

Again, however, the question arises whether it is appropriate to single out administrative cases if the elimination of intercircuit conflicts is the goal. A solution to the problem of disuniformity or uncertainty ought to focus upon those categories of cases in which that problem is or is expected to be especially serious. The likelihood of conflict depends, among other things, on the novelty and the complexity of the issues and the presence of issues on which social attitudes may influence decisions. The significance of conflict depends largely on the importance of the cases and the need for prompt, not merely eventual, resolution. There are old and relatively settled administrative statutes as well as new and unsettled ones, simple and trivial statutes as well as complex and crucial ones. Some affect strongly held social policies or require rapid resolution and some do not. The same is true of nonadministrative cases. There is one difference: Dispersed review of the decisions of a single agency injects disuniformity into a system that, unlike criminal or accident cases, is presumably uniform at the trial level. Nevertheless, if greater certainty is our goal, it might be better to attack the problem wherever it is most acute rather than obliquely by singling out administrative cases.

Moreover, before drastic alterations are made in the present jurisdictional system in the name of removing disuniformity, a serious effort should be made to determine the extent of the problem. In Canada, for example, a commentator observing that one reason for creation of a new federal court was the "obvious" danger of conflicting provincial decisions noted that it was "difficult to point to this having occurred in practice."[291]

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[290] Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 (Supp. 1974), *as amended*, Act of Aug. 24, 1974, Pub. L. No. 93-387, § 211, 88 Stat. 750 (noted in 12 U.S.C.A. (Supp. 1974)).

[291] Mullan, *supra* note 223, at 23-24. *See* the doubts raised by Judge Friendly as to the lack of proof that, outside of the tax field, there are serious problems of unresolved conflicts or that the Supreme Court is overburdening itself to resolve conflicts. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 654-55 (1974); Testimony of Judge Henry Friendly Before Commission on Revision of the Federal Court Appellate System, 1974.

3. *Better Understanding.* Perhaps the dominant rationale for creation of specialized administrative courts has been the notion that review of highly technical administrative decisions requires a better grasp of the subject matter than can be expected from the generalist judge. Frankfurter and Landis rationalized the Court of Customs Appeals on the ground that customs decisions confronted judges with problems "outside their usual province of experience."[292] President Taft, in urging establishment of the Commerce Court, maintained that the issues on review of ICC decisions were "often technical," requiring "knowledge of the business."[293] Patent cases, Judge Friendly argues, present issues "beyond the ability of the usual judge to understand without the expenditure of an inordinate amount of educational effort . . . and, in many cases, even with it."[294] British admirers of the French administrative courts headed by the Conseil d'Etat applaud the decision to entrust jurisdiction to experts who understand what they are reviewing rather than to ordinary judges who are often "strangers to the administrative process and unsympathetic to its needs" and whom the authors scornfully characterize as "the reasonable man on the Clapham omnibus."[295]

It is obvious that concentrated experience in handling a particular category of cases facilitates understanding. A court whose sole function is to review FPC decisions would quickly become familiar with pipeline rate regulation even if its judges had no previous background in the subject. Further, if it were thought desirable, such judges could be chosen on the basis of their prior training and experience. The decider will invest more time and effort in learning the administrative field if he can expect the knowledge gained to prove useful later on. He can decide more speedily because he need not obtain a general education in the field case-by-case. The litigants, too, will find it more efficient to present cases before judges who need not be given a cram course in the background technology. And it goes without saying that the judge who knows what he is doing is less likely to make accidental errors through misunderstanding of the technology or of the body of the law being applied. The sensible client, one supposes, would prefer to hire a tax lawyer in a tax case, and a patent lawyer in a patent case; the same philosophy should perhaps apply to judges. As Judge Friendly asks, why should "lack of understanding" be "deemed a precious asset"?[296]

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[292] F. Frankfurter & J. Landis, *supra* note 277, at 148-52.

[293] *See* B. Schwartz, *supra* note 287, 1031-32.

[294] H. Friendly, *supra* note 10, at 156-57.

[295] L.N. Brown & J. Garner, *supra* note 266, at 10, 156-61. *See also* the recommendation of the Law Commission (U.K.) that proposals for an administrative court or division be taken off the shelf because of the view "held by some" that "a lack of expertise" sometimes renders ordinary judges "unable to get near enough to the administrative decision" to review it to best advantage, Cmnd. No. 4059, at 7 (1969); the statement of the sponsor of New Zealand's legislation providing for an administrative division that the judges of that division "will have a thorough knowledge of administrative law and of the background and the economic and social policies which the particular Acts concerned were designed to implement," D. Benjafield & H. Whitmore, Principles of Australian Administrative Law 362 (4th ed. 1971); and the argument of the Australian Attorney General's committee for a federal administrative court because a "developing expertise" would be "very desirable." Report of Commonwealth Administrative Review Committee, Austl. Parl. Paper No. 144, at 72-73 (1971).

The logical extension of this reasoning is to create separate courts for each narrow subject, administrative or otherwise—the narrower the better. To state this proposition, however, is to raise a red flag. Our system has largely been premised on the notion that such extreme specialization not only carries certain dangers,[297] but is unnecessary because increased specialization brings diminishing returns. Not every kind of case is so complicated that only one who does nothing else can understand it well enough to perform the rather limited function of judicial review. In any event, any effort to create more or less specialized tribunals for administrative or for any other cases ought to be based upon a detailed analysis of the kinds of cases in which there is a significant need. The challenge to automotive emission standards in *International Harvester Co. v. Ruckelshaus*,[298] for example, presented a much more compelling argument for an expert tribunal than does the ordinary social security or workmen's compensation case. And once again, as illustrated by patent and antitrust litigation, the problem is not peculiar to administrative cases.

In sum, the three principal alleged advantages of a separate administrative court point in somewhat different directions. The unburdening of the circuit courts is neutral as to which cases should be transferred and what sort of courts set up, so long as the regular courts are relieved of a significant burden and the new courts not overloaded. The elimination of disharmony argues for transfer of cases in the most disharmonious categories, and preferably to a single court. The creation of better understanding may call for relatively narrowly defined jurisdiction over cases involving a high degree of technical or other difficulty.

B. *Disadvantages*

1. *Loss of the Generalist Perspective.* The more time one devotes to a particular subject, the less time one has to learn about others. Analogy has been one of the geniuses of the common law; it surely has its place in administrative review. To put blinders on judges and confine them to narrow compartments not only creates the risk of significant disuniformities but also enhances the danger that issues may be resolved on the basis of ignorance as to past experience in related fields. It seems likely, for example, that we have a better law of administrative procedure because the same courts review a number of different agencies, and a better procedure in both courts and agencies because of the comparisons perceived by courts that review them both. Excessive

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[296] H. Friendly, *supra* note 10, at 157.

[297] *See* notes 299-324 and accompanying text *infra.*

[298] 478 F.2d 615 (D.C. Cir. 1973).

compartmentalization can also frustrate substantive programs in which there is a need for coordination.[299]

Another aspect of the generalist perspective is the possible advantage of the outsider's unprejudiced vision. The cognoscenti have indispensable information on technical matters, but they may also share preconceptions that the fresh mind unclouded with intimate knowledge would wish to reexamine. A specialized court made up of experts in the art of marine navigation would surely have been less likely than was the generalist Learned Hand to find the whole industry remiss in failing to adopt the radio.[300] Similarly, the skeptical outsider may have something of value to add in administrative cases just because he has not been steeped in the traditional wisdom with all its imperfections.

2. *The Loss of Diverse Views and the Concentration of Power.* That different courts decide the same issue in different ways is commonly lamented; uniformity is a value much prized. As Judges Friendly and Oakes have pointed out, however, correct decision may often be promoted by filtering an issue through a variety of judges with a variety of points of view.[301]

What the first court decides wrongly may be better understood by the second or third. When the Supreme Court waits for additional lower court decisions before tackling a difficult new problem, it is often in anticipation that a few more heads may contribute to ultimate understanding of the issues. Collegial decision by the first court is a safeguard against error, but it is hardly failsafe. Indeed, the dynamic of the decisionmaking process itself—deference to one's colleagues, the persuasive powers of a single member, the assignment of primary responsibility to the writing judge and the limitations of the parties presenting a particular case—dilutes somewhat the element of collegiality and increases the possibility that a fresh look by another body may afford additional insights. Moreover, as will be considered more closely below,[302] an entire court or its majority may come to embrace a particular point of view that may not be representative. Thus, while conflicting decisions resulting from multiple venue can be damaging if not promptly resolved, they have important uses in the short run. Perhaps it would be wiser to make certain that conflicts can be resolved rather than to try to prevent them—if that can be done without undue burden to the system.

Dispersion of jurisdiction among several courts not only assures that a number of judges may contribute their judgment to the solution of difficult problems; it also vastly reduces the potential of a single wrong decision to harm an administrative program or those subject to it. The more important the administrative program, the greater the dangers of giving sole power over it to a single court. Commenting on the death of the Commerce Court, Frankfurter and Landis observed that the courts are increasingly "arbiters of the economic and social life . . . at times of the whole country," and that "the issues reach . . . beyond the experience and insight of a single court, however well equipped."[303] "Less than ever," they concluded, "is it likely that Congress will entrust these issues to five men, even though invested with the authority of bench and woolsack and subject to the corrective scrutiny of the Supreme Court."[304]

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[299] In Illinois, for example, one argument for consolidating pollution-control agencies was that it would be unfortunate to clear up an air-pollution problem only to create water pollution. *See* Ogilvie, Special Message on the Environment 2 (April 23, 1970).

[300] The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

[301] H. FRIENDLY, *supra* note 10, at 186; Oakes, *Developments in Environmental Law*, in 3 ENVIRON. L. REP. 50001, 50011 (1973) (opposing establishment of a specialized environmental court: "[t]here is a healthy cross-fertilization which occurs from having different courts rule on given environmental questions and then living with those decisions for a time").

[302] *See notes* 306-12 and accompanying text *infra*.

3. *The Quality of the Judges.* The doubt that seems to merit the most careful attention in connection with the creation of any tribunal of limited subject matter concerns the quality of the judges. If one could be confident that the judges of a new administrative court would be as able and disinterested as the average judge of the circuit courts, one could view the prospect with more equanimity. But it is not at all clear they would be.

One question is whether the nature of the job will be such as to attract persons of the same caliber as those who now sit on the federal bench. To some, perhaps, it is the very variety of the present circuit judgeship that makes it both prestigious and intellectually satisfying. To spend one's life deciding social security cases, for an extreme example, might seem less exciting than being a federal circuit judge and to make one less of a figure in the legal community.[305] If, on the other hand, all the interesting administrative business were taken from the circuit courts and given to a prestigious new tribunal, it would be the former whose seats might become less desirable, as their caseload would consist in larger proportion than today of such grist as automobile accidents and frivolous prisoner petitions. At worst both regular and special courts could be damaged, if a substantial body of interesting business were taken from the former and distributed in narrow categories among a number of the latter. Knowledgeable second-raters might replace more intelligent generalists, and it is to be doubted that such a development would make for sounder decisions.

A second aspect of the problem of judge quality, prominently voiced during the debates on the creation and abolition of the ill-fated Commerce Court, is that judges may be not so much incompetent as biased.[306] This problem in turn has two aspects. First, there is the danger that pressures may be brought to bear upon the appointment process. "We merely remind the Senate," said opponents of the Commerce Court, "of the tremendous influences that will inevitably surround the selection of such a tribunal."[307] Professor Joseph Sax has explained persuasively why these pressures are greater the narrower the jurisdiction of the tribunal:

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[303] F. FRANKFURTER & J. LANDIS, *supra* note 277, at 173-74.

[304] *Id.* at 174.

[305] *Cf.* Friendly, *supra* note 291, at 649 (the increasing criminal diet may make district judgeships less attractive).

[306] *See* F. FRANKFURTER & J. LANDIS, *supra* note 277, at 153-74.

> [Ordinary] judges . . . will spend only a tiny fraction of their time and energy dealing with environmental disputes. For this reason the process of judicial selection is not significantly affected by anyone's estimate of a given judge's attitudes about those issues. This is a most important fact, one which can hardly be applied to any institution that deals regularly with environmental matters. A President or a Governor who is choosing an environmental council cannot avoid consideration of the attitude that important interest groups—whether the oil industry or conservation organizations—will adopt toward that choice.[308]

The second danger is that bias may develop after service on a separate court. One possibility is that, as they come to know more and more about the subject—or from the outset if chosen because of prior knowledge—the judges may increasingly substitute their judgment for that of the agency in which Congress has vested discretion. In contrast, the uninitiated general judge may be inhibited by knowledge of his own inadequate information from interfering too much with agency discretion.[309] How much interference is too much depends, of course, on the point of view. An agency is likely to favor considerable deference to its experts, and those it regulates may find or believe that the inexpert judge lets the agency get away with murder. On the other hand, private attorneys we interviewed also favored review in the ordinary courts, but for the opposite reason: They feared that specialist judges might be too deferential to agencies with which they regularly deal and whose attorneys they have come to know personally.[310] The architects of the Commerce Court, cognizant of these dangers, provided for assignment of regular circuit judges on a revolving basis to prevent "the possibility of the court becoming packed with life members, dealing with a special subject, where their opinions, or a majority of them, are fixed one way possibly leaning toward the interests of the railroads."[311] This concession, naturally, laid the legislation open to the criticism that it did not even provide expert judges.[312]

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[307] *Id.* at 157.

[308] J. Sax, Defending the Environment: A Strategy for Citizen Action 109 (1970).

[309] The comments of a number of federal agencies reflect a belief that an environmental court could become a "super-agency" where the judges would not hesitate to substitute their views for those of the administrator . . . .

President, Acting Through the Attorney General, Report on the Feasibility of Establishing an Environmental Court System VI-24 (1973) [hereinafter cited as Report of the President]. *See also* Hines & Nathanson, *Preliminary Analysis of Environmental Court Proposal Suggested in the Federal Water Pollution Control Act Amendments of 1972*, in *id.* at C-13.

[310] *See, e.g.*, argument of Senator Hardy against the Commerce Court, in F. Frankfurter & J. Landis, *supra* note 277, at 161: "when you get your court set aside for the trial of one class of cases only, with representatives of the United States, far removed from the people, upon one side, and the representatives of the great railroads . . . on the other, after a while your impartial judge begins to see things in a little different light from what he did before."

Evaluating the danger that judges of a specialized court may be incompetent or biased is largely an exercise in conjecture. The lessons of experience are helpful but not conclusive. Not only is the success of specialized tribunals a mixed bag; observers also differ in their assessment of success. No hint of personnel problems is found in recent British appraisals of the French Conseil d'Etat.[313] Judge Friendly reports a "lack of any serious criticism" of the Court of Claims or of the Court of Customs and Patent Appeals,[314] and close observers have applauded the work of the wartime Emergency Court of Appeals.[315] The Tax Court is thought by many practitioners to be pro-Government.[316] The Commerce Court was abolished largely because it was believed to be pro-railroad, but later commentators, pointing out that the railroads had fared even better with the circuit courts than with the Commerce Court, have questioned that judgment.[317] Of the federal administrative agencies themselves, one encounters criticism on grounds both of craftsmanship and of partisanship that one does not often hear about the circuit courts.[318] As Professor Nathanson remarked in evaluating a recent proposal for a separate court of administrative review, "[t]he charge that regulatory commissions over the years tend to be dominated by the industries they regulate, whether justified or not, is too common to be ignored entirely in establishing new institutions."[319]

An additional consideration suggested by the history of the Commerce Court is that a specialized court, whether or not actually partisan, is peculiarly susceptible to being thought partisan.[320] If a single court frustrates a popular administrative program, it is natural for those disappointed to blame judicial bias; the finger cannot so easily be pointed where responsibility is shared by eleven circuit courts.[321] Confidence in the integrity and intelligence of decision makers may make unfavorable decisions more acceptable.

The spectrum of experience permits distinctions; varying models of specialized tribunals pose personnel problems in different degrees. The status of the tribunal is surely relevant to the willingness of top people to serve. Greater prestige and job security make it more attractive to be an article III judge than to be a board member, and tenure during good behavior is strong armor against improper influence.[322] To equal or approach the personnel level of the courts of appeals, any new courts should enjoy article III status.

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[311] 2 B. Schwartz, *supra* note 287, at 1060.

[312] *See id.* at 1096.

[313] *See* L.N. Brown & J. Garner, *supra* note 266.

[314] *See* H. Friendly, *supra* note 10, at 154.

[315] *See* Hyman & Nathanson, *Judicial Review of Price Control: The Battle of the Meat Regulations*, 42 Ill. L. Rev. 584, 630 (1947); Nathanson, *supra* note 278, at 198, 212-13.

[316] *See* H. Friendly, *supra* note 10, at 166.

[317] *See* F. Frankfurter & J. Landis, *supra* note 277, at 164.

[318] For milder examples, *see* the materials collected in W. Gellhorn & C. Byse, Administrative Law: Cases and Comments 1-53 (6th ed. 1974); G. Robinson & E. Gellhorn, The Administrative Process 831-33 (1974).

[319] Nathanson, *supra* note 278, at 198, 214.

[320] *See* note 317 and accompanying text *supra*.

[321] *See* F. Frankfurter & J. Landis, *supra* note 277, at 164.

But tenure alone may not be enough. The more narrowly jurisdiction is defined, the greater the danger of making the job repetitive and unattractive or of low prestige, the greater the pressure of special interests upon the appointive process, and the greater the danger of excessive or insufficient deference through overfamiliarity with personalities or programs. The Commerce Court was an especially unpropitious institution in this regard. It dealt with a single agency then regulating a single potent industry—in contrast to the more successful Court of Customs and Patent Appeals and Emergency Court of Appeals, both of which were concerned with the economy as a whole,[323] to the Conseil d'Etat with its general administrative jurisdiction, and to the District of Columbia Circuit, which combines exclusive jurisdiction over certain administrative functions with a healthy diet of general federal jurisdiction.

The one redeeming feature of the Commerce Court was that the job was important enough to be attractive. But this very importance was another substantial factor in the court's downfall. The intense political controversy surrounding the issues on review assured maximum pressure on the appointive process and enhanced the likelihood that the court would be considered partisan.[324] Courts of narrow specialized jurisdiction may have a better chance of surviving if they deal with relatively obscure, noncontroversial matters such as government contracts, customs and patents. On the other hand, if the job is quiet enough not to invite political intrusion, it may lack sufficient sex appeal to attract the best judges. Are we certain that the lack of outcry over the Court of Claims and the Court of Customs and Patent Appeals is attributable to good performance rather than to public indifference? Timing, of course, is important: The Emergency Court of Appeals and the Commerce Court had the good fortune to go largely out of business before the issues became stale and the glamor faded. Tales of administrative agencies proceeding from zeal to indolence over time furnish a useful admonition.

4. *Jurisdictional Litigation*. The jurisdictional lines separating administrative from general courts should be drawn as precisely as possible in order to minimize litigation over the proper forum. There is one type of such litigation that would be reduced by providing a single forum for each subject category: the present litigation over proper venue among courts of concurrent jurisdiction. But the determinants of proper venue under existing law have

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[322] *See* THE FEDERALIST, Nos. 78, 79 (A. Hamilton).

[323] *See* Nathanson, *supra* note 278, at 214.

[324] *See* F. FRANKFURTER & J. LANDIS, *supra* note 277, at 162-64; H. FRIENDLY, *supra* note 10, at 153-54; Nathanson, *supra* note 278, at 209-10, 214.

been rather carefully picked out by years of decisions;[325] a new crop of uncertainties might be created by a carelessly drawn statute creating new distinctions based upon subject matter rather than geography. To give a court jurisdiction over "environmental" cases, for example, would invite wasteful jurisdictional litigation,[326] much as has the French provision giving the Conseil d'Etat jurisdiction over matters "affecting the administration."[327] It would appear best to emulate existing statutes that define review jurisdiction simply in terms of the agency whose order is being reviewed, taking pains to clarify such ambiguities as whether or not "orders" includes regulations,[328] whether preliminary steps in the administrative process are to be reviewable, and what is to be done if issues within the experience of the new court arise in enforcement or other proceedings somewhere else.[329]

5. *Litigation Convenience.* In cases of small money value, centralized jurisdiction in a single court may deprive litigants of significant economies afforded by a district court or even by a circuit court forum.[330] This possibility suggests either defining the jurisdiction of an administrative court so as to exclude categories rich in small cases or providing for the court to sit on circuit, as some current and past specialized courts have done.[331] This latter expedient would be constitutionally necessary if the new court's jurisdiction extended to the trial of criminal cases.[332] The travel burden might make the job less attractive.

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[325] *See generally* D. Currie, *supra* note 6, at 657-62. Congress does not help when it provides for review in the "appropriate" circuit court, since there is no general venue statute for those courts. *E.g.*, section 307(b), Clean Air Act, 42 U.S.C. § 1857h-5(b)(1) (1970).

[326] *See* Report of the President, *supra* note 309, at VII-1 (1973).

[327] On the one hand, some acts of the government, such as operation of a ferry, have been held within the jurisdiction of the regular civil courts because they were the sort of activity that could be conducted on the same terms by private enterprise. On the other, acts of private parties have been held to be within the jurisdiction of the administrative courts when they concerned what was considered to be a public service. Moreover, the civil courts may determine "flagrant irregularity" in governmental action; damage actions for government infringement of personal liberty; compensation for takings; certain tax cases; and accidents involving government employees. Finally, in a criminal (but not in a civil) case a regular court may pass upon a defense questioning the validity of an administrative action. Brown and Garner, on whose work this footnote is based, point to one case in which after eleven years of jurisdictional litigation the parties started all over in the proper forum; but they conclude that the seriousness of jurisdictional conflicts should not be exaggerated because "the rules which define the respective competences are now [after a hundred years] reasonably well settled." L.N. Brown & J. Garner, *supra* note 266 at 80. This would obviously not be true of a new administrative court.

[328] *See* notes 140-60 and accompanying text *supra*.

[329] The possible complexities of such a provision are suggested by the details of Judge Friendly's proposal for a patent court, to which among other things cases would be removed from state or federal courts whenever the validity of a patent was called into question by way of defense. H. Friendly, *supra* note 10, at 160.

[330] For a detailed discussion of litigation convenience as between district court and circuit court, *see* notes 28-36 and accompanying text *supra*.

[331] The Tax Court, the Court of Claims and the Emergency Court of Appeals. *See* H. Friendly, *supra* note 10, at 169; Nathanson, *supra* note 278, at 212.

[332] U.S. Const. art. III, § 2. *See* Hines & Nathanson, *supra* note 309, at C-16.

C. *Models*

If the problems of circuit court overload, disuniformity and lack of expertise are found to be serious, and if the overload problem cannot be cured by surgery on such other portions of the case body as diversity and post-conviction cases, consideration will surely be given to alteration of the scheme for reviewing administrative decisions. A number of model review schemes could be concocted and tested against the considerations laid out in the preceding sections of this Article, including elimination of all direct circuit court review and the creation of a large number of highly specialized courts. We limit ourselves to a few of the more prominent models.

1. *Exclusive Jurisdiction in Designated Courts of Appeals.* If our sole object were to minimize disuniformity and improve the quality of adjudication, rather than to relieve the circuit courts of part of their mounting caseload, we might well opt against the creation of a new court but in favor of giving the existing circuit courts exclusive jurisdiction to review action of designated agencies, as the District of Columbia Circuit now has for certain types of FCC and EPA actions. SEC cases, for example, might be parceled out to the Second Circuit; FPC cases to the Fifth; CAB cases to the Third, and so on. The judges would presumably acquire an expertise in the subject matter and yet still bring to bear the perspective of the generalist. Conflicts would be minimized or eliminated. The total appellate caseload would not be increased and, to the extent that the same issue need not be relitigated circuit after circuit, might be slightly reduced. Political pressures upon both the appointment and decision processes would presumably be minimized.[333]

The fact is, however, we are very much interested in docket relief and therefore turn our attention to the desirability of increasing judicial capacity rather than merely redistributing the load.

2. *Exclusive Jurisdiction in Administrative Appeals Courts.* A court of administrative appeals could take a variety of forms. Its jurisdiction could be limited to a single agency or homogeneous class of agencies, or could embrace a wider and more heterogeneous range. Its members could be appointed from sitting appellate judges or from non-judges. The latter could be selected either for their preexisting expertise in one or more of the subject areas of adjudication or on the basis of more general qualifications similar to those ordinarily used in picking appellate judges. If sitting judges were to be designated, their appointment to the new court could be permanent or for a fixed term, after which they would return to their home bench. The new court could be divided into permanent panels based on subject matter or shifting panels like the present courts of appeals. All panels could sit in Washington, or some

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[333] For reservations as to the completeness of this protection, *see* notes 334-35 and accompanying text *infra*.

could sit elsewhere, achieving a measure of regionalization. Conflicts among the panels would presumably be resolved en banc; and panels specialized by subject matter could refer issues of general administrative law to the full court. Many other variations could be imagined.

(a) *Subject Matter Jurisdiction.* The most important variable is subject matter jurisdiction. In general, we think it highly desirable that the jurisdiction of any court of administrative appeals be quite broadly drawn in order to reduce the pressures of special interests on appointment and decision, to avoid the loss of perspective that can come from overcompartmentalization, and to assure that the job is varied enough to be interesting. We concede that special circumstances or urgent need may in exceptional instances justify single-subject courts. Our best judges tell us that only technical experts can understand patent cases well enough to do them justice,[334] and a persuasive case has been made for a Court of Tax Appeals.[335] But the acceptability of a special court in such fields as patents and taxation may depend heavily on the lack of high political controversy or of a narrowly defined interest group constituency. Even if the need were comparable, we should be less sanguine as to the success of a court limited, for example, to labor or to environmental cases.

The suggestion of an environmental court was raised by the 1974 amendments to the Water Pollution Control Act and opposed by the Attorney General in a bulky 1974 report.[336] Several of the report's objections can easily be met. Threshold litigation over what constitutes an "environmental" case would present less of a problem if jurisdiction were limited to cases arising under named statutes or under statutes administered by the EPA. Giving the new court appellate jurisdiction only would eliminate the need for circuit riding in criminal cases and reduce generally the inconvenience of a centralized forum. The objection that there are too few cases to keep such a court busy appears to have been cured by time,[337] though prediction of future workloads is hazardous.[338] But the hard problems of the specialized court, stressed by the Attorney General, remain: the possible loss of broad perspectives for resolving general issues, the lost benefit of diverse views, the danger of overreview by expert judges, the concentration of power—all exacerbated by the danger of partisan appointments in a politically sensitive field. "It would be difficult, if not impossible," wrote Professors Hines and Nathanson, "to create a special court to handle environmental matters which would not be regarded as partisan by

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[334] *See, e.g.*, H. Friendly, *supra* note 10, at 153-61, and authorities cited therein.

[335] *See, e.g.*, *id.* at 161-71, and authorities cited therein.

[336] Report of the President, *supra* note 309.

[337] A computer printout furnished by the Administrative Office to the Commission on Revision of the Federal Court Appellate System shows that direct appeals to the circuit courts from the EPA in fiscal 1974 numbered 454; that does not exhaust the environmental cases.

[338] *See* notes 281-82 and accompanying text *supra*.

a substantial segment of the parties affected by its decisions."[339] In the absence of the strongest showing of need, we should be very reluctant to place so much power over such important matters in the hands of a single court not insulated from appointive pressures by substantial non-environmental business.

Further, the Attorney General expressed serious reservations as to the need for an environmental court, reporting that the affected agencies had expressed confidence in the ability of the ordinary courts to handle even the toughest environmental cases. The position of the EPA here is especially instructive:

> We believe that the courts have shown that their ability to cope with the environmental issues involved is adequate, and is certainly not inferior to their ability to cope with the technical issues involved in non-environmental cases. . . .
>
> The parties will both do their best to explain the issues to the court in layman's language. In our experience there are few issues that cannot be explained adequately in this way. . . .
>
> The kinds of environmental issues that typically arise do not directly involve obscure matters of scientific theory or techniques. Instead, they are questions of evidence, of the form "What do the facts show the effect of a given factor (concentration of a pollutant, use of a control method, use of a pesticide) to be on a variable (human health, pollution emissions, the survival of certain species of wildlife)?" Such questions are relatively easy compared with those that often arise in patent cases concerning whether a given invention differs from a previous one to the extent necessary to make it patentable . . . .[340]

While the Deputy Assistant Attorney General for the Land and Natural Resources Division has more recently indicated a desire to reevaluate the report's conclusion in the light of further experience indicating considerable technical difficulty,[341] we believe several decisions of the circuit courts under the Clean Air Act, technical as the issues are, eloquently substantiate the Attorney General's position that the sacrifice of expertise is not so serious as to justify the risks of a narrow specialized environmental court.[342]

The 1971 Ash Council report, agreeing that separate courts to review each federal agency would be undesirable,[343] proposed the establishment of a single

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[339] Hines & Nathanson, *supra* note 309, at C-20.

[340] REPORT OF THE PRESIDENT, *supra* note 309, at B-55, B-56.

[341] *See* Address by Walter Kiechel, Jr. before ABA Comm. on Environmental Law, April 27, 1974.

[342] *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied, sub nom.* Portland Cement Corp. v. Administrator, 417 U.S. 921 (1974); Texas v. EPA, 499 F.2d 289 (5th Cir. 1974). This assessment is made against the background of the experience of one of the authors as Chairman of a full-time state pollution control board for two and a half years. *See also* Hines & Nathanson, *supra* note 309, at C-13, C-14 (describing several district court opinions under NEPA as "monuments," along with "equally impressive" decisions in other technical fields as antitrust and railroad receiverships, to the capacity of the federal judicial system "to master a body of learning and experience far removed from the classical pathways of the law").

[343] To so limit the court's scope would seriously diminish its attractiveness to

Administrative Court to review agency decisions in the fields of transportation, power, and securities now made by the ICC, CAB, Federal Maritime Commission (FMC), FPC and SEC. It argued that a specialized court with a limited jurisdiction would yield better understanding of the issues and relief of the burdened circuit courts.[344]

The Administrative Conference, echoing a report by Professor Nathanson, was critical. There were too few such cases to give the courts of appeals significant relief: only 176 in fiscal 1969, less than 3 percent of their caseload. Moreover, the jurisdiction proposed was so narrow as to render the new court unable to make the anticipated "contributions to uniformity in administrative law" and as to create the risk that the court might "become or give the appearance of becoming identified with the agency or industry point of view."[345] We agree. The optimum administrative court should enjoy the safeguards of a broader jurisdiction, and we are not convinced that the Ash Council proposal singles out those administrative decisions most deserving of review by a specialized court.

(b) *A Suggested Model.* Jurisdiction of an administrative court should be determined with an eye upon the problems to be corrected. It should include the most technically difficult, the most novel and uncertain, and the most time-consuming cases in order to maximize the reduction of poor understanding, disuniformity and overburden. Absent detailed study of each category of cases, we can only make tentative suggestions. Attacks upon regulations under such new and technical statutes as those governing air and water pollution, noise, occupational health and consumer safety seem obvious candidates on all three scores. Individual cases as well as regulations from the Nuclear Regulatory Commission (NRC), the Federal Aeronautics Administration (FAA), the Food and Drug Administration (FDA), the FPC, the FMC, the FCC, the SEC and the ICC are likely to be both important and complicated, even though the governing statutes have been much interpreted. NLRB cases loom large in number but not, we think, in technical complexity,[346] and, though forum shopping has sometimes proved of concern, there is

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> the most qualified candidates for judgeships, would encourage an overassociation with the agency being reviewed, and might lead to a usurpation of the agency's policy responsibilities. It would also preclude development of integrated administrative procedures as well as uniform application of procedural advances.

President's Council on Executive Organization, New Regulatory Framework: Report on Selected Independent Regulatory Agencies 54 (1971).

[344] *Id.* at 51-56.

[345] *See Full Statement of Views of the Administrative Conference on the Report of Selected Independent Regulatory Agencies of the President's Advisory Council on Executive Organization*, in 2 Administrative Conference of the United States, Recommendations and Reports 27, 30-31 (1971); Nathanson, *supra* note 278, at 198.

[346] The General Counsel of the NLRB reports that "cases from this agency do not involve complex scientific or technical questions"; and that of 298 circuit court cases in fiscal 1974, 66 were decided without oral argument and 72 without opinion. Letter from Peter G. Nash, General Counsel to the NLRB, to Antonin Scalia, Chairman of the Administrative Conference, Oct. 25, 1974, at 2, 5. Judge Leventhal testified before

substantial intercircuit uniformity today.[347] Trade Commission cases range in theory from enormous antitrust matters of considerable technical complexity to relatively simple matters of deceptive advertising. The former should be reviewed by the same courts reviewing other antitrust cases to avoid disuniformity; the latter seem to present no cause for a special court. Immigration, social security, longshoremen's act, employee dismissal[348] and mining cases, we suspect, tend to be uncomplicated, the issues not novel, and the case for a local forum strong. Additional categories of cases can be analyzed in the same manner.

Thus, as a preliminary sketch, one can visualize a separate article III appellate court, or perhaps two such courts, with jurisdiction to hear appeals from individual decisions of the NRC, FCC, FPC, ICC, CAB, FMC and SEC, and challenges to regulations adopted by these agencies, and by the FDA, the FAA and the EPA, and under the consumer-product safety and OSHA provisions. For the sake of consistent application of the law, the administrative court should also have appellate jurisdiction over district court cases—for example, enforcement actions—arising under the same statutes. To create such a court would eliminate intercircuit conflicts and uncertainties in these important fields; it would facilitate judicial understanding of these complex problems; and it would remove a large and growing body of cases from the overburdened circuit courts.[349] Jurisdiction would be broad enough that no

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the Commission on Revision of the Federal Court Appellate System on May 21, 1974 that even contested NLRB cases are often "routine" and of "no significant weight" since they frequently turn on "whether there is substantial evidence of a refusal to bargain, or discriminatory discharge."

[347] *See* note 98 and accompanying text *supra.*

[348] Our impression is generally supported by the view of the General Counsel of the Civil Service Commission that, "except for the areas of pay and classification, which sometimes prove troublesome to the courts, most of the Commission's cases do not involve highly technical or complicated questions." Letter of Anthony L. Mondello to Antonin Scalia, Chairman of the Administrative Conference, Oct. 21, 1974, at 2.

[349] Determining the caseload such jurisdiction would impose is somewhat difficult not only because of shifting litigation patterns but also because of the way the statistics are reported. Direct appeals from the listed agencies to the circuit courts numbered 823 in fiscal 1974 according to the 1974 A.O. REPORT, *supra* note 1, table B3, and to the supplemental computer printout cited in note 337 *supra*:

Direct Appeals from Selected Agencies to Courts of Appeals, 1974

AEC (now NRC)	2
CAB	37
CPSC	0
EPA	454
FAA	2
FCC	90
FDA	15
FMC	7
FPC	166
OSHA	35
SEC	15

Professor Nathanson, *supra* note 278, at 199 n.7, reports there were 96 ICC cases taken to three-judge district courts in fiscal 1969; the A.O. REPORTS, *supra* note 1, do not list these separately. There were also appeals from district court cases involving the above agencies. Most of the others are buried under the heading "other." The total caseload single industry would be likely to dominate, even over time, the selection of judges. Finally, the breadth and importance of the jurisdictional spectrum we have outlined is sufficient, we believe, to make the job highly attractive. Stripping the regular courts of these important cases does diminish their glamor but leaves them such challenging matters as constitutional attacks upon state action and the enforcement of civil rights laws. Such a court would meet many of the objections made by the Attorney General against an environmental court and by the Administrative Conference against the Ash Council proposal.[350]

The possible objection that a jurisdiction embracing such a grab bag of diverse specialties would be incompatible with the stated goal of decision-making by experts brings us to the further question of how members of the new court should be selected. If oversight were confined to a single agency or homogeneous group of agencies, it might be feasible to draw members from non-judges with preexisting expertise in the subject area. Indeed, the sole convincing rationale for so narrow a jurisdictional grant would be to maximize the court's subject-matter expertise. This aim arguably would be best promoted by appointing persons with special knowledge of the technology and economics of the regulated industry, since the technical competence required to come to grips with the scientific issues presented in environmental or nuclear-licensing cases is altogether different from that required, say, for intelligent evaluation of the economic regulation in such a field as transportation.

Given even a narrowly defined jurisdiction, however, we would recommend against this method of appointment, since it would maximize the danger both of political pressure in the appointment process and of overintrusive supervision by the judiciary. Moreover, such appointments would minimize the likelihood of obtaining either the perspective of the generalist or two additional varieties of expertise that would be of value on a court of administrative review. One is the art of judicial review of administrative action; it calls for an understanding of the administrative process, a feeling for the proper limits of the judicial role, a sophistication in the application of such standards as "substantial evidence," "arbitrary or capricious," and so on. It is the kind

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on the basis of the above figures might approximate 1000, about equal to that of the Seventh and Eighth Circuits. Nine judges can survive such caseloads only because they include easy cases that can be subjected to summary procedures that would seldom be available to a special court whose cases are selected precisely because they are the most difficult. Significant increases, moreover, may be expected in the near future in such categories as water pollution, noise, OSHA, and consumer product safety, where programs are just getting under way; and a probable dropoff in litigation over air pollution regulations should be partly offset by a significant gain in corresponding enforcement actions. To add NLRB cases would increase the load by 641 cases on the basis of 1974 figures so it would approach in bare numbers that of the Second Circuit, or about half that of the Fifth.

[350] *Compare* Professor Nathanson's opposition to the Ash Report *with* his concession that to "concentrate judicial review of all the federal regulatory agencies in a separate division of the federal courts of appeals" would be "fairly debatable." Nathanson, *supra* note 278, at 215-16.

of skill one would expect to be acquired by the judges of the District of Columbia Circuit by virtue of their heavy dose of administrative appeals. The final kind of expertise might be labeled "procedural"; appellate judges who regularly hear a gamut of civil and criminal cases, especially the latter, become experts in the requirements of due process.[351] The narrow specialization which is calculated to maximize the subject-matter expertise is by no means the best prescription for the other two talents.

As the jurisdiction of the court is broadened to include diverse agencies and subject matter, the desirability and even the feasibility of staffing it with preexisting subject-matter expertise become increasingly doubtful. If the special court were intended to be an "expert" body in the sense that its members come to the bench already qualified as experts by their pre-judicial experience, no member could be considered an expert in more than a small part of the subject areas that comprised the court's business. For example, if one member of the court were chosen for his experience in the field of natural gas regulation, another for his background in environmental matters, still another for his knowledge of securities law, there would be a great danger either that the specialists in a particular sector of the court's jurisdiction would come to dominate the panel in cases arising in that area or that the court would eventually decompose into sub-specializing panels in order to bring maximum subject matter expertise to bear upon each case. Furthermore, since fewer judges would be chosen from each field of expertise, constituent groups might have an even stronger incentive to press for the appointment of a sympathetic member than if the jurisdiction of the court were narrower.

If, on the other hand, members of a special court with broad jurisdiction were chosen from non-experts and expected to acquire their knowledge simply through frequent and continuing on-the-bench exposure to the several areas of litigation, the argument would be a different one: Because of the diversity of cases coming before them, the judges could not be truly expert in any. But to insist upon judges who are truly technical experts may be to lose sight of the limited function of judicial review. More likely, all that is needed is the sort of familiarity that the District of Columbia Circuit has acquired in a number of administrative fields by virtue of its concentrated though varied administrative diet. As Judge Leventhal has argued, "judges are generally 'quick studies'"; reviewing courts "do not need enough knowledge or understanding to determine what the government should do" but require only enough background understanding for what is "primarily a general appraisal of fairness, and in that they are expert."[352] Thus, we do not think the lack of narrow expertise is a serious objection to a court with broad administrative review jurisdiction.

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[351] This sensitivity might be thought merely another name for what we have been calling "the perspective of the generalist," but the two are not identical. The latter refers to the breadth of background and sympathy a judge brings to his task by virtue of his experience of life; the former is the more specific competence he acquires through practice in adjudicating claims of procedural unfairness.

For similar reasons, we believe it would be highly desirable—especially if the jurisdiction of the court were to embrace a broad range of agencies—for its members to be appointed from sitting circuit court judges. A sitting judge transferred to the court of administrative appeals would hopefully bring to his new assignment a breadth of perspective not ordinarily to be found in the narrow specialist, along with some degree of experience in evaluating administrative action and in enforcing procedural fairness. And constituency pressure for the appointment of benign judges, though not eliminated altogether, would be abated somewhat by virtue of the limited range of candidates eligible for appointment, and the frequent absence of any well-defined differences in attitude among the candidates.

If the members of the special court were selected from sitting appellate judges, the question would arise whether appointment was to be permanent or temporary and, if the latter, whether for a fixed term or at the appointee's pleasure, the judge returning in either case to the circuit court from which he came. Three considerations favor temporary appointment. First, there is the possibility that too few judges of the highest caliber would be attracted to a lifetime position on a court they might view as less prestigious and less interesting than the circuit courts. Second, there is the contrary possibility that curtailing their jurisdiction would make the circuit courts less attractive and create a strong demand among the judges for a tour of duty on the special court. Third, it may be desirable to supply the new court, through regular turnover, with a continuous infusion of new blood and fresh attitudes, to avoid staleness, rigidity and loss of interest. Stronger considerations, however, argue for permanence of appointment. First, and most important, it would defeat a cardinal purpose of the special court if its members were relieved of their duty just as they began to acquire a true mastery of the job. Second, a revolving-door court would be less likely to achieve high prestige and drawing power than one with membership as stable as that of other appellate courts. Finally, a double-edged consideration: An increase in the frequency of appointment would multiply the opportunities for political influence but at the same time would tend to make the special court more broadly representative of the appellate bench as a whole, thus neutralizing any bias present in the initial selection process. On balance, we believe the weightier argument favors permanence, but we do not regard the choice as critical.

D. *Conclusion*

Creation of even the most acceptable court of administrative appeals would be a radical departure from our established system of judicial review.

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[352] *Statement of Judge Leventhal, supra* note 2, at 11-12.

We should be hesitant to incur the risks that always attend new institutions in the absence of a strong showing that the present system has serious flaws that cannot be cured by less drastic measures.[353] The judges themselves say the courts of appeals are heavily overloaded, and we have no basis for disagreement. It might be wiser, however, to deal with this problem by limiting jurisdiction over diversity cases, which are peripheral to the function of federal courts; by providing for increased finality in criminal cases, because of the infinitesimal returns produced by the enormous investment of judicial time in sifting prisoner petitions,[354] or even by the creation of additional circuits.[355] In any event, the overload problem is no reason for singling out administrative cases. The same relief would be afforded by the creation of specialized courts for diversity or criminal cases. As for intercircuit conflicts, forum shopping and uncertainty, we think it must first be shown that these problems are serious enough to warrant major surgery, and that they are especially acute in the administrative area, before a jurisdictional change designed specifically to meet them would be appropriate. We think it food for thought that, in all the agencies we contacted, only one intercircuit conflict was put forward as having seriously impeded agency operations.[356] Finally, while an administrative court would no doubt be marginally more competent in deciding difficult administrative cases than the regular circuit courts, the latter have performed impressively in environmental cases, which are among the most difficult; and the affected agencies generally have expressed satisfaction with the ability of the appellate courts to understand and cope with technical issues.[357] In sum, we are doubtful that there is any compelling reason to single out administrative cases for review in a separate court. The problems of overload and uncertainty, if found to require action, might be better approached directly.

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> Perhaps the path of wisdom lies in the view that by and large our system of review by general constitutional courts has worked reasonably well, and that it is only in specific areas where one can anticipate a problem or shortfall in performance, that changes should be charted.

Id. at 14.

[354] *See* H. FRIENDLY, *supra* note 10, at 139-52; Friendly, *Is Innocence Irrelevant? Collateral Attack on State Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

[355] *See* note 86 *supra*.

[356] For the one serious EPA conflict, *see* text following note 289 *supra*. The AEC, now the NRC, reports no intercircuit conflicts, and no adverse effects from potential conflicts, during the past five years; the FAA, Consumer Product Safety Commission, SEC, Comptroller General and Federal Reserve report they have had no problems. The CAB reports a single conflict in five years on which certiorari was not sought because the Solicitor General thought the issue "sui generis" and the sums at stake insufficient. The NLRB has suffered nine conflicts since July, 1972. In three the Board chose not to seek certiorari, awaiting "better vehicles" to present the issues; in five of the remaining six the Supreme Court resolved the conflict.

As for the related forum-shopping issue, none of the agencies responding to our inquiry reported a significant problem. The NLRB, as to whose decisions such forum shopping has been suspected in the past, reports that the problem of duplicate review is solved by transfer under 28 U.S.C. § 2112 (1970) (giving the agency power to file the record and thus to determine which of several possible appeals courts will hear a pending appeal), and that forum shopping has no "real impact" upon operations. *See* letters to Antonin Scalia, Chairman of Administrative Conference, from General Counsel Offices of the AEC, Oct. 7, 1974; Dep't of Transportation, Oct. 31, 1974; Consumer Products Safety Commission (CPSC), Nov. 18, 1974; SEC, Oct. 30, 1974; Dep't of Treasury, Oct. 8, 1974; Federal Reserve Board, Oct. 10, 1974; CAB, Oct. 18, 1974; and NLRB, Oct. 25, 1974. *See also* Hines & Nathanson, *supra* note 309, at C-16, C-17 (the performance of the federal courts in environmental cases generally "reveals little grounds for complaint about inconsistency").

This conclusion is buttressed by the stubborn drawbacks of even a general administrative court—the inherent loss of diversity of view, jurisdictional uncertainties that may survive the best efforts at drafting, and the need for continual readjustment of jurisdiction to accommodate shifts in caseload or in novelty. Not least, there is the danger long ago perceived by Frankfurter and Landis, of concentrating great power in a small number of individuals. If this proved unacceptable in the narrow field of railroad regulation, it is even more questionable where the very heart of our national regulatory programs is at stake. There is security in the dispersion of power, and that ought not be lightly discarded.

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[357] In addition to the communications included in the REPORT OF THE PRESIDENT, *supra* note 309, *see* the responses of the AEC, Comptroller General, Consumer Product Safety Commission, FAA, Federal Reserve Board, ICC, NHTSA (highway safety) and SEC to our questionnaire. Letters to Antonin Scalia, Chairman of the Administrative Conference, from Office of General Counsel of AEC, Oct. 7, 1974; CPSC, Nov. 18, 1974; Dep't of Treasury, Oct. 21, 1974; Dep't of Transportation, Oct. 30, 1974; Federal Reserve Board, Oct. 10, 1974; ICC, Nov. 5, 1974; and SEC, Oct. 10, 1974. Of the agencies we questioned, only the General Services Administration (GSA) and the military have expressed any dissatisfaction on this score. The former's concern was with government procurement cases: "Many judges . . . experience difficulty in distinguishing between the general concepts and the specialized ones." Letter to Antonin Scalia, Chairman of Administrative Conference, from GSA, Dec. 24, 1974. The Army argues that "most district judges are not qualified to decide" the "complex technical and scientific questions" in patent and certain contract cases. The Navy, principally concerned with constitutional problems such as reservists' wigs and counsel at summary courts-martial, says that "while the courts have displayed sufficient understanding to deal with purely scientific questions . . . , they have been singularly inept in understanding the complexity of the day-to-day problems of the military society . . . [and] repeatedly interfere in military matters wherein they have little or no competence." Letter to Antonin Scalia, Chairman of Administrative Conference, from Dep't of Defense, Dec. 6, 1974. While the necessity of living with review in the regular courts for at least the short term might dampen any public expressions of discontent, we think the agencies' responses not without significance.

The creation of an administrative court, however, would facilitate the provision of technical staff help, if that be thought desirable, to the judges. To equip every circuit court, not to mention every district court, with experts in the entire gamut of relevant knowledge would be prohibitive and highly inefficient. A pool of such talent to be assigned to various courts as needed would preclude the establishment of a confidential staff relationship between judge and expert such as might develop on a single administrative court. Lawyers for the parties are likely to oppose such technical assistance in fear that the unseen expert, whose views cannot be challenged because they are kept confidential, will actually make the decision. An alternative might be a technically qualified master who would write a report open to party criticism, or a court-employed expert who would give his views in open court. Either of these would deprive the judges of the significant values of confidential advice.

The Illinois Pollution Control Board was equipped with technically qualified assistants—sanitary engineers—who worked under the close supervision of the Chairman. They worked not on whole cases but on selected technical issues referred to them by the Chairman and served very largely as translators of technical language. They also raised questions for the Board to put to the parties. Board control of matters of policy was of course aided by the fact that the Board heard only pollution cases. But on balance we believe that a small staff of technical advisors could function effectively in connection with a broadly defined court of administrative appeals and could be kept by strong-minded judges from unduly influencing decisions. In any event, we think the outlook for such advisors distinctly better on such a court than in the circuit courts.

Finally, there remains the possibility, or legitimate apprehension, of improper influence on the appointive process. We have argued that the broad jurisdiction envisioned for such a court would reduce the vulnerability of the court to political influence on the appointment process, but we must sound a note of caution. A broad and diverse jurisdiction is no guarantee that regulated firms and industries or other interested groups will not press for the appointment of friendly judges. It is not the narrowness of the court's jurisdiction, but its exclusivity, that supplies the motive for such pressure. A court that heard all CAB business, even if it heard much else besides, would be well worth the airlines' capturing. One might reasonably hope that, with many influences being brought to bear, none would be effective; and that no single interest group could persuasively demand a "seat" on the court when so many others had as good a claim. But one should not bank too heavily on this hope. Cutting across the various fields of regulation, there is, after all, a fairly constant opposition between what might be called the "consumer" interest and the "industrial" or "utility" interest. A potential appointee whose background commended him to the natural gas or electric power industry is apt to be acceptable to railroad, airline and shipping interests as well and, by the same token, unacceptable to consumer and environmentalist groups in general. No doubt this greatly oversimplifies the matter. There are many areas of conflict between industries (between competing transportation modes or energy sources, between carriers and shippers, between wholesale and retail gas suppliers, and so on) and of potential conflict between consumers and environmentalists. When these qualifications have had their full due, however, breadth of jurisdiction would still be at best an unreliable safeguard against interest-group pressure.[358] In short, we do not favor the establishment of an administrative court.

III. PROPOSALS FOR A NATIONAL COURT OF APPEALS

An impressive array of prominent judges, attorneys and scholars have recently endorsed proposals for a National Division of the Court of Appeals intended to resolve intercircuit conflicts, settle important questions of federal law, and relieve the dockets of the Supreme Court and of the circuit courts.[359]

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[358] There is a related danger. Tradition has come to dictate the geographical distribution of judgeships within existing circuits and has been said to have affected both geographical and ethnic composition of the Supreme Court from time to time. Division of jurisdiction on subject matter lines could encourage a corresponding tradition of allocating seats on an administrative court along lines either of special interest or of subject matter competence. We should view any such development as highly alarming: Courts are not the place for voting according to interest-group representation, both because too few interests can be represented and because the theory of judicial (as opposed to legislative) review is that more neutral values shall prevail.

[359] *See, e.g.*, ABA REPORT OF THE SPECIAL COMMITTEE ON COORDINATION OF JUDICIAL IMPROVEMENTS (Feb., 1974); Carrington, *supra* note 31; Griswold, *The Supreme Court's Caseload: Civil Rights and Other Problems*, 1973 U. ILL. L.F. 615; Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576 (1974); *Statements of Judge Hufstedler and of Mr. Griswold Before the Commission on Revision of the Federal Court Appellate System*, April 1, 1974.

Details are both variable and hazy. Some, like Dean Griswold, favor lifetime appointments to the new division for stability and continuity of decision; others, like Professor Carrington, prefer brief assignments of regular circuit judges, perhaps by the Chief Justice, to avoid specialization or to relieve pressures on the appointing process. Some, like Judge Hufstedler, would have the new court review decisions of the regional circuit courts; others, including Dean Griswold, would give it jurisdiction now vested in the regional courts in order to avoid a fourth judicial tier. The plans of the ABA and of the Advisory Council of Appellate Justice would make decisions of the new court final only after they had lain before the Supreme Court for a specified time without adverse action.

The most difficult problem, which is not adequately resolved by any of the proposals, would be establishing the criteria for determining which cases should go to the National Division. The ABA committee recommended that the Supreme Court should determine this question within guidelines specified by Congress, suggesting possible National Division jurisdiction over collateral attacks on criminal convictions, tax cases, review of federal administrative decisions and cases from state courts of last resort. Judge Hufstedler, agreeing that Congress should list categories for the Supreme Court to choose from, includes tax and patent cases, direct and collateral review of state criminal convictions, review of the NLRB, SEC, FCC, FPC, FAA and ICC, nonconstitutional intercircuit conflicts, and such federal statutory matters as Congress may designate. Dean Griswold is less specific, arguing that the new court should have jurisdiction not of all cases within a subject category, lest it become overly specialized, but of cases "where a prompt decision, having nationwide validity, is desirable."[360] This, he says, would exclude nearly all criminal and diversity cases and "other types of cases turning largely on their facts, or without any general or national significance."[361]

The variety of these proposals makes it difficult to evaluate their impact upon the system of judicial review of administrative action. In general, we endorse Judge Friendly's criticism of the National Division proposals.[362] He sees no proof that the Supreme Court is too busy, leaves important conflicts too long unresolved, or wastes time resolving unimportant ones. He doubts that the circuit courts would be significantly relieved by creating an additional court to review their decisions. He fears that the new scheme would impose additional burdens on the Court because its inaction would result in the establishment of national law. He points out that there are too many administrative appeals to be lodged in a single court and that centralization would impose a substantial financial burden on the small litigant in many administrative cases.

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[360] Griswold, *supra* note 359, at 632.
[361] *Id.* at 629.
[362] *See* Friendly, *supra* note 291; *Statement of Judge Friendly Before the Commission on Revision of the Federal Court Appellate System*, 1974.

If the National Court were to replace rather than to review the circuit courts, its impact would be similar to that of a general court of administrative appeals to the extent that its workload consisted of administrative cases. Commingling some nonadministrative cases would help retain a generalist perspective but would impair the ability of the new court to develop a consistent administrative law. The problem of centralized power over important areas of the law would remain, as would a serious risk of jurisdictional litigation unless lines were drawn very carefully indeed. To give the new court jurisdiction over "all cases needing prompt national decision," for example, would create hideous jurisdictional disputes.

If, on the other hand, the National Court were to review decisions of the courts of appeals, conflicts could be resolved without losing the value of diverse views where that is significant. But the relief such a scheme would afford the ordinary courts would be much reduced, for all cases reaching the new court would already have been litigated through the circuit courts. Professor Carrington anticipates that once an issue has been settled by the new court, suits raising the same question would no longer be filed, as they now are, in other circuits.[363] Quantifying the saving is obviously difficult. And the additional price of this scheme is to subject the parties to the costs and delays of still another level of appellate review. We view this as the less desirable alternative.[364]

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[363] Carrington, *supra* note 31, at 616.

[364] As this Article went to the printer, the Commission on Revision of the Federal Court Appellate System unveiled a proposal for the creation of a permanent National Court of Appeals to decide cases referred by the Supreme Court or transferred by a court of appeals. *See* Remarks of Senator Roman L. Hruska at the National Conference on Appellate Justice, Jan. 26, 1975, *reprinted in* 121 Cong. Rec. S 1077-80 (daily ed. Jan. 28, 1975). The Supreme Court could refer any case within its appellate jurisdiction and would be expected to promulgate rules to govern its discretion in so doing. The courts of appeals could transfer any case in which there was an actual intercircuit conflict or in which "a persuasive showing" was made that "an immediate authoritative determination" of a dispositive, recurring question of federal law was "in the national interest." The National Court could refuse to accept cases transferred from the regional courts, and its decisions on the merits would be reviewable on certiorari.

We have not yet had an opportunity to give this important new proposal the careful consideration it deserves. We do, however, perceive some difficulties. The proposal deals directly with one of the problems discussed in this section: the lack, as Senator Hruska put it, of "confidence that the Supreme Court in the decades ahead can be expected adequately to satisfy the needs for stability and harmony in the national law as the demands continue to increase." *Id.* at S 1078. It appears largely to avoid the problem of a fourth tier, as in nearly all cases the new court would supplant either Supreme Court or court of appeals. But we do not share the Commission's view that "there would be no occasion for litigation over jurisdiction." Presumably this conclusion is based upon the fact that the decision to send a case to the National Court would be discretionary and (we would fervently hope) not itself subject to review. *But cf.* 28 U.S.C. § 1404(a) (1970), authorizing interdistrict transfers for litigation convenience; some such decisions have been reviewed by mandamus under 28 U.S.C. § 1651 (1970), *see, e.g.*, Hoffman v. Blaski, 363 U.S. 335 (1960). We do not think the discretionary nature of the decision precludes litigating about it. While little additional effort might be required of either the parties or the judges in Supreme Court cases in which jurisdictional papers already must be prepared, the Commission's proposal

The question remains what to do about overload problems in the courts of appeals. It may be that the creation of an administrative court is the least of evils. We hope not. It would be a pity to create an inferior system of judicial review because no better way can be found to restore to the federal courts the time required to do their job.[365]

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would impose a new certiorari-like practice upon the courts of appeals. Moreover, the parameters governing that practice, except in cases of actual conflict, are at this stage vague enough to give rise to real problems. A broad view of when "an immediate authoritative determination" would be "in the public interest" might strip the regional courts of all but routine cases, eliminate the benefits of diverse judicial views—a problem adverted to but not resolved by Senator Hruska—and either swamp the National Court or necessitate wholesale and time-consuming retransfers. Surely no such interpretation is intended, but we must confess an inability to perceive even a subjective criterion short of this that lends meaningful content to the proposed test for transferability. At the other extreme, regional courts jealous of their interesting cases might frustrate the purpose of this scheme by excessive hostility to transfers. At this problem stage, therefore, we have doubts as to the administrability of the proposal. Perhaps when the Commission fleshes out the bare bones of its ideas, it can satisfy those reservations. Perhaps further reflection will convince us that the difficulties noted above are not as serious as we now believe them to be. Our tentative view, however, is that the problem of unsettled national law would have to be considerable indeed to justify the adoption of the Commission's plan.

[365] *See* Hines & Nathanson, *supra* note 309, at C-7, C-20.

REPORT IN SUPPORT OF RECOMMENDATION 75-4

(As published in Environmental Law Reporter, No. 1975, 5ELR 50211)

The Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards

*William R. Shaw**

INTRODUCTION

In Chattanooga, Tennessee, as in hundreds of other communities and states, air pollution is a vital concern. Consequently, the Hamilton County Air Pollution Control Board has been authorized to fight air pollution in several ways. One is to require that stationary sources of air pollution (*e.g.*, incinerators, factories, hospitals and even apartment complexes) obtain permits to continue emitting smoke and other gas or particulates into the atmosphere. The permit requirement is used to learn how much pollution such facilities are creating and, if in violation of local standards, how they intend to reduce it. A permit is required of every owner or operator of a stationary facility capable of producing air pollution. However, one local facility, the Volunteer Army Ammunition Plant, has refused to comply with this permit requirement. Its refusal is premised on the ground that because the plant is owned by the United States Department of the Army, although operated by a private concern, the plant is a federal facility,[1] to which the County Board permit requirement does not legally apply. Consequently, litigation is now pending between the County Board and the Secretary of the Army to determine whether the Board has the authority to require that the federal facility obtain a permit.[2] The federal officials responsible for the plant have promised repeatedly that the Volunteer Plant will comply with the County Board's air quality standards, but continue to refuse to submit to the County permit requirement. Local officials are skeptical; in their view, full compliance without a permit is illusory.

While this conflict was developing in Tennessee, a different procedure led to a different result in Estaceda, Oregon. The Eagle Creek National

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This article is based on a report which was prepared for the Committee on Compliance and Enforcement Proceedings of the Administrative Conference of the United States in support of a recommendation on the same subject. The report represents only the views of the author. While it has not been approved by the Committee or the Administrative Conference, the recommendation which it supported has since been adopted by the Conference. See Appendix A, 5 ELR 50228.

[1] Federal facilities are defined by §2(4) of Executive Order 11752, 38 Fed. Reg. 34793 (Dec. 19, 1973), to mean "the buildings, installations, structures, land, public works, equipment, aircraft, vessels, and other vehicles and property, owned by, or constructed or manufactured for the purpose of leasing to, the Federal Government."

[2] Hamilton County v. Callaway, Civil Action No. 6581 (E.D. Tenn.).

Fish Hatchery there is a federal facility owned and operated by the United States Fish and Wildlife Service. This hatchery had discharged pollutants into Eagle Creek which decreased the oxygen content, raised the temperature and created aesthetic problems. The State of Oregon requires a water discharge permit for each facility capable of polluting the waters of Oregon. Unlike the permit system in Chattanooga, however, permits enforcing the Oregon law are issued by the United States Environmental Protection Agency (EPA) if the discharger is a federal facility. As a result, the Eagle Creek National Fish Hatchery applied for a water discharge permit from the regional office of EPA, which issued a permit to the hatchery on the condition that the hatchery meet a compliance schedule requiring it to purify its water by December 31, 1976. The compliance schedule requires the purchase and installation of necessary waste water treatment equipment. There is no lawsuit or conflict between local and federal officials in Estaceda.

These two situations illustrate the inconsistent compliance procedures which have been developed to ensure that over 20,000 owned and 60,000 leased federal facilities meet environmental quality standards.[3] These facilities include defense installations, fish hatcheries, national parks, research parks and laboratories, hydroelectric dams, nuclear power plants, hospitals, prisons, naval vessels and numerous other sources of environmental pollution. Congress has directed that these facilities meet state and local pollution control standards "to the same extent [as] any person." [4] The President has directed agency heads to see that facilities within their administrative control meet federal and non-federal environmental quality standards. The agency heads, themselves, have issued implementing regulations.[5] Yet inconsistent and inadequate enforcement procedures jeopardize the attainment of statutory standards. Instead of leadership in the nation's environmental effort or, at least, equal compliance with the obligations imposed on private enterprise, present compliance procedures have engendered insufficient efforts to ensure federal facility compliance with environmental quality standards.[6]

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[3] General Services Administration (GSA), *Inventory Report of U.S. Owned Real Property*, June 30, 1974, p. 8; GSA, *Real Property Leased to the U.S. Throughout the World*, June 30, 1974, p. 7.

[4] Section 313 of the Federal Water Pollution Control Act (FWPCA), as amended, 33 U.S.C. §1323 (Supp. II, 1972). See identical requirements in §118 of Clean Air Act (CAA), 42 U.S.C. §1857(f) (1970), and §4 of the Noise Control Act, 42 U.S.C. §4903 (Supp. II, 1972). *See also*, E.O. 11752, 38 Fed. Reg. 34793, ELR 45017 (Dec. 19, 1973).

[5] *See*, for example, Department of Defense Directive No. 5100.50 (May 24, 1973, as amended), Department of Agriculture Property Management Regulations, §104–52.000 (Nov. 1971, to be amended soon).

[6] It is important to note that the National Environmental Policy Act of 1969 (42 U.S.C. §§4321 *et seq.*) fails to provide an effective means of addressing the problem of pollution from federal installations. NEPA's requirement that the responsible federal official prepare a statement detailing the environmental impacts of major federal actions significantly affecting the environment has had a profound influence on federal procedure and on agency decision making. However, the requirements of NEPA apply to new facilities or large additions or modifications to existing facilities, rather than to federal installations operating in the same manner now as they have for some time. Moreover, NEPA's operative provision, the impact statement requirement, is directed more at bringing about changes in federal decision-making practices than it is at the content of the decisions reached. NEPA, in itself, therefore, does not necessarily bring about specific reductions in levels of pollutant generated by federal facilities.

This article will examine the compliance programs imposed on federal facilities in five environmental areas: air, water, solid waste, noise, and ocean dumping.[7] Five different sets of procedures for ensuring compliance are currently in effect, one in each of these areas. The analysis which follows will suggest several recommendations which aim at a more uniform and effective federal compliance effort.

I. The Mandate to Abate (1948 to the present)

Over 25 years ago Executive Order 10014 [8] directed federal agency heads to cooperate with state and local officials in an effort to reduce water pollution. In 1958, a similar order was issued in response to the growing concern over air pollution.[9] In 1966 two revisions were made: one for water [10] and one for air.[11] These revisions required agency heads to investigate their needs for pollution control equipment and to submit a request for funds along with plans for improvement to the Bureau of the Budget. Although these revisions directed agency heads to continue cooperation with state and local officials, the responsibility to ensure compliance with environmental quality standards remained with the very agencies that operated the facilities.

In early 1970 the executive orders were revised and superseded by Executive Order 11507.[12] This revision was a substantial improvement, setting more precise standards for compliance. It required that agency plans for improvement be submitted to the Director of the Bureau of the Budget (now the Office of Management and Budget (OMB)) "to facilitate budgeting for necessary corrective and preventive measures." It required concurrence by the "respective Secretaries" (now the Administrator of EPA) with the "performance specifications" outlined in the agency plans. And it guaranteed that funds allocated for pollution abatement projects "would not be diverted to other uses." The President's statement that accompanied the Order promised a renewed federal effort "to sweep its own doorstep clean."

The plans which Executive Order 11507 required from agency heads are still the heart of the Administrative strategy to ensure federal facility compliance with environmental quality standards although the order was superseded by Executive Order 11752 in 1973.[13] This strategy calls for an assessment of needs and the development of necessary plans by the agencies responsible for each federal facility. The plans are then submitted to OMB for special consideration and inclusion in the President's Annual Budget. OMB circulars A–78 and A–81,[14] dealing with air and water pollution control equipment respectively, focus special attention on all budget requests concerning air and water pollution control equipment.

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[7] (1) Federal Water Pollution Control Act, 33 U.S.C. §§1251 *et seq.* (Supp. II, 1972); (2) Clean Air Act, 42 U.S.C. §1857 (1970); (3) Noise Control Act, 42 U.S.C. §§4901 *et seq.* (Supp. II, 1972); (4) Solid Waste Disposal Act, 42 U.S.C. §§3251 *et seq.* (1970); and (5) Marine Protection, Research and Sanctuaries Act; 33 U.S.C. §§1401 *et seq.* (Supp. II, 1972).

[8] 3 C.F.R. 836 (1948).

[9] E.O. 10779, 3 C.F.R. 421 (1958).

[10] E.O. 11288, 3 C.F.R. 559 (1970).

[11] E.O. 11282, 3 C.F.R. 549 (1970).

[12] E.O. 11507, 3 C.F.R. 277, ELR 45001 (1973).

[13] E.O. 11752, *supra* n. 4.

EPA's Office of Federal Activities (OFA) also receives copies of these agency plans and budget requests. This office secures comments from EPA regional staff and attaches a "high," "medium," or "low" priority rating to each proposal. Only then does OMB decide whether to include the request in the President's Annual Budget. Several years experience with this procedure has produced very few "low" ratings by OFA, and still fewer omissions of the agency requests from the President's Annual Budget.[15]

This administrative strategy has worked well in many instances as Table I reveals.

TABLE I

Proposed Projects to Implement OMB Circulars A-78 and A-81 [16]

	FY 1973	FY 1974	FY 1975	FY 1976
Number of Projects Proposed	1,982	647	549	906
Number of Depts. and Agencies Proposing Projects	13	13	16	16
Estimated Cost of Projects Proposed (in millions)	$394.7	$432.8	$401.3	$574.8

Whenever facility operators and their agency supervisors have, in fact, assessed their needs and proposed plans and budget requests, then the OMB program has virtually assured that funds are appropriated and spent on the proposed equipment. Regrettably, many facility operators and, in turn, their agency supervisors, have been cynical and suspicious.[17] They have feared that the funds for the proposed projects would be taken from elsewhere in their operating budgets and have recognized that related increases in operating and manpower budgets necessitated by the new equipment would *not* be given special consideration by OMB. Consequently, some have chosen not to initiate plans and budget requests, thereby aborting the whole strategy.

In the same year that Executive Order 11507 was issued, Congress, dissatisfied with the progress to date, revised its statutory requirements for federal facilities. Section 118 of the Clean Air Act was added to require expressly that agency heads "shall comply with Federal, State, interstate, and local requirements . . . to the same extent that any person is subject to such requirements. . . ." In 1972 the same language was included in the amendments to the Federal Water Pollution Control Act (FWPCA), and in §4 of the Noise Control Act of 1972.[18] Thus, by the end of 1972 Congress had imposed the same requirements upon federal facilities with respect to air, water and noise pollution as are applicable to private facilities, in order to compel recalcitrant agencies to initiate the OMB procedures for securing pollution control equipment.

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[14] These circulars have been revised and consolidated in Circular A–106 (ELR 47009).

[15] *See* Shaw, Review and Evaluation by the EPA of Proposed Air Pollution Control Projects at Existing Federal Facilities, IAS 73–12 (1974) (unpublished report for the Administrative Conference of the United States).

[16] EPA's Report to OMB, Pollution Abatement Needs at Federal Installations, for fiscal years 1973, 1974, 1975, 1976.

[17] As reported by OMB budget examiners.

In partial consequence of these three laws, other congressional acts,[19] and the ever-growing concern for environmental protection, the President revised the executive order again in late 1973.[20] This last revision expanded the coverage of the order to include five more pollution areas: ocean dumping, solid waste, noise, radiation and pesticides. Significantly, it also shifted some responsibility from agency heads to the Administrator of EPA.[21] Under the new Executive Order 11752, he is directed to (1) "maintain a review of Federal facilities compliance," (2) "mediate conflicts between Federal agencies and State, interstate, or local agencies in matters affecting the application of, or the compliance with applicable standards," and, most important, (3) "develop in consultation with the heads of other Federal agencies a coordinated strategy for Federal facility compliance with applicable standards. . . ." Pursuant to the new executive order, OMB has replaced Circulars A–78 and A–81 with Circular A–106 (December 31, 1974) which includes the additional five pollution areas. Thus, at the end of 1974, it appeared that the President had implemented a consistent and adequate administrative procedure. Federal facilities were directed to request sufficient funds for pollution control equipment for seven major environmental areas. Requests made pursuant to the OMB Circular were virtually assured success in the appropriation process.

Despite this appearance of consistency and effectiveness, the strategy has serious shortcomings. It has worked quite well in securing necessary funds whenever facility operators decide to improve their pollution control equipment. But it has failed to ensure that federal facility operators seek those funds in the first place. Reliance on a carrot without an effective stick is like using a vise with only one jaw. A two-pronged management scheme is needed given the competing pressures on agencies and individual facilities. Every responsible administrator must weigh protection of the environment against production goals, personnel problems, budget restraints and other pressures or agency missions. To ensure that federal facilities will undertake the necessary actions to comply with environmental quality standards, an enforcement scheme must include compliance procedures which ensure the necessary actions by the agencies responsible. The scheme now in operation lacks the necessary compliance procedures in several of the program areas. In fact, no two program areas have similar compliance procedures. The different enforcement strategies in each program area are the subject of the next section.

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[18] Section 313 (33 U.S.C. §1323) and §4 (42 U.S.C. §4903) respectively.

[19] Resource Recovery Act of 1970, 42 U.S.C. §§3251 *et seq.* (1970); Marine Protection, Research and Sanctuaries Act, *supra*, n. 7; Federal Environmental Pesticide Control Act (FEPCA), 7 U.S.C. §135 (Supp. II, 1972); and §274(h) of the Atomic Energy Act, 42 U.S.C. §2021(h) (1970), as amended and transferred to EPA under Reorganization Plan No. 3 of 1970 (ELR 48001).

[20] E.O. 11752, *supra* n. 4.

[21] *Id.*, §3(d).

II. Existing Compliance Programs

A. Water Quality

Maintenance of water quality is a long standing environmental problem and was initially a non-federal concern within the police power of the states. Over the last quarter century, however, Congress has steadily increased the federal role pursuant to its constitutional authority over interstate commerce and the health and welfare of the nation's citizens. The 1972 Amendments to the Federal Water Pollution Control Act mark the most serious intrusion in this previously state-dominated area. Central to the amendments is the National Pollutant Discharge Elimination System (NPDES),[22] which imposed a permit requirement for the discharge of any pollutant into the nation's waters. As of December 31, 1974, all dischargers must have secured a permit from either EPA or a state agency which has a permit system approved by EPA. In order to secure the permit, dischargers must meet or have scheduled to meet a "best practicable" treatment standard by July 1, 1977 and a "best available" treatment standard by July 1, 1983. In other words, for the first time, those who use the water for waste disposal must demonstrate they are endeavoring to terminate this use.

The Administrator of EPA has delegated his NPDES permit authority to his ten regional administrators. Ultimately, it is intended that the permit authority will be delegated further to the states.[23] In fact, 24 states already have submitted to EPA their proposed programs to implement a permit system and EPA has approved over 20 of these.

Permit requirements help environmental protection efforts by putting the major burden of enforcement on the water users, who must assess their need for pollution control equipment and provide information and plans for compliance to the permit authorities. This technique of environmental protection is a significant improvement over procedures which require pollution control authorities to inspect each facility that may pollute the water and issue citations to those not in compliance. The permit system thus provides a strong stimulus for self-enforcement and simplifies the official's task by providing initial data for an investigation.

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[22] §402 of FWPCA, 33 U.S.C. §1342 (Supp. II, 1972).

[23] *Id.*, §402(b).

Equally important is the provision for involving the interested public. The NPDES system has an elaborate procedure which requires that the public be given notice and opportunity for comment on permit applications. Public hearings and "adjudicatory hearings," with appeals to the Administrator and the courts, may be held to review permits.[24] As these hearing and appeal mechanisms are available to "any person," they provide an opportunity for the interested public to criticize inadequate permit conditions. There is also a citizen suit provision in the Act itself which allows recourse to the courts to stop violations of the Act or its implementing regulations.[25]

The NPDES is now well-established. Hostility and litigation exist, but the issues raised concern the operation of NPDES, not the underlying authority. Over 30,000 industrial applications and 20,000 municipal applications are on file at EPA. Five thousand of these comprise "major sources," generating 90 percent of all water pollution, and EPA has issued permits to nearly all of these dischargers.[26]

Continuing controversy surrounds the question of how the NPDES applies to discharges from federal facilities. Pursuant to §402 of the Act, the Administrator of EPA has received applications and issued permits to the federal facilities subject to the NPDES.[27] When confronted with the question of whether to delegate this authority to those states submitting acceptable PDES programs, EPA chose to reserve its authority to issue permits to federal facilities.[28] This reservation of permit authority was challenged by two states in lawsuits consolidated before the Ninth Circuit Court of Appeals. That court recently held in *California v. EPA* [29] that §313 of FWPCA requires federal facilities to comply with state procedural (permit) requirements in addition to state substantive requirements. It therefore ordered EPA to rescind the regulations which reserved to EPA the permit authority for federal facilities.[30] It further ordered EPA to stop rejecting the PDES programs for the states of

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[24] 40 C.F.R. 125.32, 125.35, 125.36, and 125.36n; 33 U.S.C. §1369(b) (Supp. II, 1972).

[25] 33 U.S.C. §1365 (Supp. II, 1972).

[26] Energy and Environmental Analysis, Inc., Assessment of the National Pollutant Discharge Elimination System of Public Law 92–500, unpublished study prepared for the National Commission on Water Quality, 140–143 (1975).

[27] EPA has relied on §§402, 313 and 301(a) of FWPCA to issue permits to federal facilities. However, the Department of Justice, Division of Lands and Natural Resources, has expressed doubt that these sections are explicit enough for the authority assumed by EPA. *See* Memorandum from Wallace H. Johnson, Asst. Attorney General, responding to an earlier draft of this article, dated Mar. 27, 1975, on file at the Administrative Conference.

[28] 40 C.F.R. 125.2. *See* also §1 of E.O. 11752, *supra* n. 4.

[29] 511 F.2d 963, 5 ELR 20213 (9th Cir. Feb. 13, 1975), *cert. granted* 43 U.S.L.W. 3674.

[30] 40 C.F.R. 125.2(b).

Washington and California simply because they included federal facilities within the scope of their permit authority.

The Court of Appeals concluded that the language in §313, when read in the context of the whole Act, was sufficiently clear to constitute a waiver of the Plenary Powers Clause and the Supremacy Clause of the Constitution. It reached this result in spite of its admission that the legislative history was ambiguous, and it gave short shrift to Executive Order 11752 and the Sixth Circuit Court of Appeals' recent decision to the contrary.[31] Appeals from both decisions are slated for argument this term before the Supreme Court.

The decision in *California v. EPA*, if allowed to stand, may cause considerable turmoil. Federal facilities now are willing to apply for permits from EPA. They have shown great reluctance to apply for state permits, despite their obligation and stated intention to meet state and local substantive requirements. The most commonly expressed concern is the myriad of forms and procedures likely to deluge those federal agencies which own or operate facilities in numerous states.[32] In short, opposition has not been addressed to the permit requirement, but to the balkanization of its administration.

B. Air Quality

The second environmental program covered by Executive Order 11752 concerns air quality. Historically, the preservation of air quality has also been a state and local responsibility. Under the Clean Air Act of 1970, however, Congress directed the Administrator of EPA to develop minimum standards and prescribe essential elements for enforcement programs which each state must develop and maintain. Since 1970 all 50 states have submitted and received at least partial EPA approval for their State Implementation Plans (SIP's). These plans are the heart of the statutory enforcement scheme for stationary sources of air pollution emissions.[33] Each state has established certain Air Quality Control Regions (AQCR's) and designated maximum emission standards applicable to each pollutant in each region. The SIP's then prescribe the states' enforcement programs to ensure compliance with those standards. Approximately one-half of the states require permits be obtained by operators of stationary sources of air pollution. The permits are often conditioned on schedules which ensure future compliance.

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[31] In Kentucky v. Ruckelshaus, 497 F.2d 1172, 4 ELR 20484, (6th Cir. 1974), *cert. granted* 43 U.S.L.W. 3499, that court held that virtually identical language in §118 of the Clean Air Act did not require federal facilities to comply with state procedural requirements. See text accompanying n. 34, *infra*.

[32] See agency responses to an earlier draft of this article, on file at Administrative Conference of the United States.

[33] Motor vehicle emission and fuel standards are treated separately. Title II of the Clean Air Act, 42 U.S.C. §§1857f–1 *et seq.* (1970). The air pollution control program for motor vehicle emissions and fuel standards is focused on the manufacturing and distribution stages for motor vehicles and fuels. Since federal facilities are affected only indirectly, this article has omitted discussion of this subject. See the discussion in Subsection F, *infra*, concerning pesticide control.

Section 118 of the Clean Air Act imposed state and local air quality control requirements on federal facilities, unless exempted by the President in "the paramount interest of the United States." As noted above, virtually the same requirement now appears at §313 of the Federal Water Pollution Control Act and §4 of the Noise Control Act. These sections require federal facilities to comply with state and local requirements to "the same extent [as] any person." That provision, coupled with the SIP's, suggested to many a rather simple enforcement scheme, namely that states impose SIP's equally on federal facilities and private enterprise. The simplicity of the proposal has not, however, insured its acceptance. Federal agencies have not agreed that such an application of §118 is consistent with the Supremacy Clause of the Constitution, nor with the concept of sovereign immunity. Their argument, which echoes the losing viewpoint in *California v. EPA*, admits that §118 imposes state and local substantive air quality standards on federal facilities, but denies that it imposes state and local procedural requirements; in other words, it deems permits, administrative orders and other procedural enforcement devices to be outside the mandate of §118.

This substantive-procedural gloss on §118 has been explored by two United States Courts of Appeals, which reached contrary conclusions.[34] An appeal is now pending before the Supreme Court. But it is unlikely that judicial resolution will insure effective compliance, for any decision will leave substantial procedural problems. If the Supreme Court upholds the states' authority to require permits, some agencies will have to comply with a multitude of different state and local procedures; if, on the other hand, the court rules against state procedural authority, that would leave only the present fragmented and ineffective federal procedures to ensure compliance by federal facilities with air and water quality standards. A Supreme Court decision may not totally resolve the issue, however. Despite their parallel language, §118 of the Clean Air Act, §313 of the FWPCA, and §4 of the Noise Control Act have differing legislative histories and statutory settings. In *California v. EPA* the Ninth Circuit explicitly stated that its decision interpreting §313 did not compel an identical interpretation of §118.[35]

There is no federal permit program in air quality comparable to NPDES. EPA has a unique role in the enforcement of federal facilities compliance with air quality standards. Under Executive Order 11752 it is directed to mediate disputes between federal agencies and non-federal authorities and to develop a coordinated strategy for federal facility compliance. Pursuant to this authority, EPA has developed a compliance strategy. Relying upon the cooperation of federal facilities and non-federal authorities, EPA proposes the drafting of "consent agreements" between non-complying federal facilities and EPA, co-signed by state enforcement officials. These "consent agreements" resemble the consent decrees used in some state enforcement programs as a device for securing compliance by private enterprise, but how EPA intends to get federal facilities to sign agreements is problematical. The method of enforcement is not discussed by the EPA compliance guidelines.[36]

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[34] The Sixth Circuit in Kentucky v. Ruckelshaus held that §118 of the Clean Air Act did not provide states with authority to require applications from federal agencies operating facilities in the state. The Fifth Circuit in Alabama v. Seeber, 502 F.2d 1238, 4 ELR 20793 (5th Cir. 1974) held to the contrary. California v. Stastny, 2 ELR 20561, 4 ERC 1447 (C.D. Calif. 1972) raised the same issue, and is now on appeal before the Ninth Circuit (No. 72–2905). *See* further discussion of the judicial confusion in this area in the text accompanying footnotes at 84–99.

[35] 511 F.2d 963, 973; 5 ELR 20213, 20217.

When dealing with private enterprise, states can issue "administrative orders" which impose sanctions for non-compliance. Under this threat of enforcement and penalty, private concerns often agree to "consent decrees," which may be judicially enforced. But EPA does not have any threat of enforcement to compel or coerce agencies to execute a "consent agreement." Nor do the EPA compliance guidelines make clear whether or how EPA would enforce any such executed "consent agreements." The agreements are premised on cooperation by federal facilities — an untested and probably unrealistic expectation, since the cooperation is being sought from facilities that are already in non-compliance. Far more troubling is the fact that the agreements are concluded in sessions closed to the public. Only state enforcement officials are invited. This leaves room for compromise that may not reflect the local public interest. In fact, no public notice is given of the consent agreement sessions. The agreements are published only when complete, but, even then, only in the *Federal Register;* no local publication is required.

The consent agreements are helpful in one respect, however. Because they compel agencies to focus attention on recalcitrant facilities, they may compel greater agency use of the OMB Circular A–106 procedures to secure funds for improvement. The agreements will also provide greater specificity and commitment than now found in the compliance schedules which agencies unilaterally submit to OMB under the A–106 Circular.

The conclusions one reaches regarding the compliance procedures in the air quality area are confusing. There is a statutory mandate to meet non-federal requirements. If procedural requirements are not imposed by states, then by whom? EPA has developed a too restrained and optimistic consent agreement procedure. A citizen suit provision exists, but such suits are too quixotic and fortuitous to be relied upon as a regular enforcement procedure. Circuit Judge Lively has suggested that states employ the citizen suit provision and prosecute federal facilities in court rather than require permits,[37] but that suggestion assumes states' attorneys general have the time and staff to pursue the arduous task of investigation and court litigation. Permit procedures, containing necessary elements of fairness and opportunity for review, are far preferable. EPA has apparent authority to pursue litigation against a federal facility once a case of non-compliance can be proved.[38] Whether EPA exercises that authority is apparently within the agency's discretion,[39] however, and in any case it has a quiet policy of not litigating against sister agencies. Only recently has any hint of change been suggested. Last fall the Administrator of Region IV notified the Tennessee Valley Authority (TVA) of its non-compliance with state air quality standards in Alabama, Kentucky and Tennessee and offered the opportunity for a conference to discuss the violation.[40] It also noted the statutory provision [41] for further court action, if that should become necessary. Delivery of the notice was mandated by law, and although administrative orders were subsequently issued, any decision to pursue more stringent enforcement action lies within the discretion of the Regional Administrator.[42] This episode reveals an initial willingness to achieve a workable compromise through a conference, followed by a tougher enforcement attitude in the face of continued recalcitrance. To construe this one example as signaling a major departure from the "consent agreement" strategy would be premature, however. The "consent agreement" strategy seems far more likely to prevail in future EPA actions against non-complying federal facilities.

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[36] *See* Federal Agencies' Guidelines for Compliance with Stationary Source Air Pollution Standards, 40 Fed. Reg. 20664 (May 12, 1975).

[37] Kentucky v. Ruckelshaus, *supra* n. 31 at 1177, 4 ELR 20487.

C. Solid Waste Management

Solid waste generated by federal facilities is also covered by Executive Order 11732. Solid waste became a major federal concern with the enactment of the 1965 Solid Waste Disposal Act, which, after several years of experience, was strengthened and renewed by the 1970 Resource Recovery Act.[43] To date the legislation does not impose federal control over local standards and programs. Rather, the Act provides grants for demonstration projects and local programs. What legislation will ultimately emerge from the debate in Congress is hard to determine, but it is fairly certain that successor legislation of some sort will be adopted in this important area.[44]

Section 211, which affects federal facilities, was added by Congress in 1970 for reasons similar to the addition of §118 of the Clean Air Act, viz., that federal facilities should provide environmental protection leadership. However, the language of this "federal facility section" is not consistent with §118 or similar sections in the water and noise control acts. Section 211 requires only that federal facilities comply with disposal guidelines promulgated by EPA; there is no requirement to meet state or local standards. The solid waste guidelines, authorized under §209 of the Act, are left to the discretion of the Administrator of EPA. Those guidelines were promulgated as proposed rules for review and comment on April 27, 1973.[45] Sixteen months later came the long-overdue final rules.[46] The preamble to the new rules admits they are less stringent than most state requirements. Specifically, they contain minimum requirements for both thermal treatment (incineration) and landfill disposal of solid waste. And they lack any procedures to ensure compliance with the standards established. Thus, the program provides still another unique and inadequate approach to federal facility pollution control.

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[38] Section 113 of FWPCA, 33 U.S.C. §1323.

[39] Kentucky v. Ruckelshaus, *supra* n. 31 at 1177, 4 ELR 20487; New Mexico Citizens v. Train, 6 ERC 2061, 2065 (D.N.M. 1974).

[40] Letter from Mr. Ravan, EPA Regional Administrator, to Mr. Wagner, Chairman TVA, Sept. 16, 1974.

[41] Section 113(c) of the Clean Air Act, 42 U.S.C. §1857c–8(c).

[42] *Id.*

[43] 42 U.S.C. §§3251–59 (1970), ELR 41901.

[44] *See, e.g.*, S. 1774 (Resource Recycling and Conservation Act) and H.R. 5487 (Waste Control Act of 1975).

The revised OMB Circular A–106 now mandates attention to solid waste disposal problems, requiring agency plans and budget requests for disposal equipment to be submitted and updated regularly; EPA's Office of Federal Activities is asked to comment on the priority that should be assigned to each such request. As noted, however, state rules and requirements are irrelevant despite the fact that they are often stricter. Thus, two neighboring communities — one a village, one a United States defense base — are held accountable to different standards. More importantly, the federal facility is not subject to any enforcement procedures. No permit program, no state or local enforcement, not even a citizen suit provision is available to ensure that federal facilities live up to these minimum guidelines. This fact is especially deplorable in light of the growing attention the state and local governments are paying to the problems of solid waste.

D. Noise Control

The fourth area of environmental concern covered by the executive order is noise pollution. Once again, Congress has explicitly recognized the primary responsibility that state and local governments have over noise control.[47] Nonetheless, the Federal Noise Control Act brings the federal government squarely into the picture in several important ways. For example, it directs the Administrator of EPA, in conjunction with the Federal Aviation Administrator and the Secretary of the Department of Transportation, to promulgate noise emission regulations for aircraft, railroads and motor carriers engaged in interstate commerce.[48] EPA alone is made responsible for developing standards for a variety of commercial products which contribute excessively to noise pollution.[49] Nonetheless, the Act leaves most sources of environmental noise primarily within the control of non-federal agencies, mandating federal intervention only when factors such as interstate commerce are critical. Thus, railroads, interstate carriers and aircraft [50] are all subject to federal controls which preempt local control. Needless to say, the interface between local and federal concerns cannot always be clearly defined.

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[45] 40 C.F.R. 240, 241; 38 Fed. Reg. 10544 (Apr. 27, 1973).

[46] 39 Fed. Reg. 29328 (Aug. 14, 1974).

[47] Section 2 of the Noise Control Act, 42 U.S.C. §4901 (Supp. 1973).

[48] Sections 17, 18, 42 U.S.C. §§4916, 4917, respectively.

Recent technological developments have permitted development of particularized noise regulations which assign maximum decibel levels according to time, place, and source. At least 21 states have enacted land use noise control statutes, and five of these (Oregon, New Jersey, Illinois, Colorado and California) have promulgated regulations pursuant to those statutes.[51] At least 11 states have ordinances for motor vehicle operation. Over 150 local governments have adopted land use noise control laws and over 50 have implementing regulations. Many more communities are seriously considering the use of comprehensive noise pollution control laws. With this proliferation in state and local noise control requirements, a problem arises for federal facilities operating within those local jurisdictions.

The federal noise control law clearly covers federal facilities. Section three of the Act defines "persons" to include federal agencies. Section four uses the same language found in §118 of the Clean Air Act compelling federal facilities to meet state and local requirements. As a result, the same legal questions exist over the question of whether "requirements" is defined to include procedural as well as substantive regulations.[52] Yet, several important distinctions need mention. First, the FAA and EPA have clear preeminence in regulating a major source of local noise pollution — aircraft. Second, within the Act's requirements for new products an exemption has been carved out for the Defense Department, NASA and any other federal agencies using products such as machinery and equipment for "experimental work." [53] Third, the procedures to ensure compliance by federal facilities are quite unclear. The only section prescribing enforcement of the Act provides for criminal sanctions and specifically precludes enforcement against federal officials. The citizen suit provision is of no more help than suggested above in the air quality area; it is quixotic and expensive, putting the entire burden on the private citizen qua prosecutor.

For certain noise sources, the Secretary of Transportation or the Federal Aviation Administrator is given authority to secure compliance.

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[49] Section 6, 42 U.S.C. §4905. These standards are enforced against the manufacturers, not users. Therefore, they would not be applicable to federal facilities directly.

[50] Section 7, 42 U.S.C. §4906. Although EPA develops these standards, the OFA reports that DOT/FAA issues and enforces them and that they are not subject to E.O. 11752.

[51] EPA, Noise Source Regulation in State and Local Noise Ordinances (Feb. 1975).

[52] *See* Air Transport Ass'n v. Crotti, 5 ELR 20236, 7 ERC 1748 (N.D. Calif. Feb. 1975).

[53] Section 3(3)(B) of the Noise Control Act, 42 U.S.C. §4902(3)(B).

Whether and how they might direct sister agencies to comply is unclear. The fourth difference is the newness of noise control. Prior to 1970, noise control was a subcategory of nuisance law (statutory or judge made). Since then, technology, the primary cause of more noise, has developed techniques for its measurement, and enforcement can be precise and often prospective. However, little litigation has developed to expose these new statutes and requirements to the scrutiny of the courts.

The newness of noise control statutes is significant in another way. Although relatively few states have yet adopted noise control regulations, a few purport to bind federal facilities. For example, in Oregon the regulatory language expressly includes federal facilities within the scope of regulated persons subject to compliance.[54] Although litigation in the air quality area concerns the question of how non-federal agencies can enforce permit compliance against federal sources, its outcome may not resolve the issue for noise control. Rather than permits, the strategy in noise control involves prescribing strict limits and then enforcing compliance against individual violators; procedures generally call for inspections or response to complaints. Once violations are apparent, local officials have authority to issue citations enforceable by local agencies or courts. Such procedures are bound to raise the same federalism difficulties experienced in the air quality programs.

E. Ocean dumping

The fifth area covered by the executive order is one which presents an example of good administration in a difficult field. The territorial seas are primarily a national concern due to their impact on national defense and interstate and foreign commerce.[55] The marginal sea bed — out to three miles — is within the province of the riparian states, while the outer continental shelf is considered the province of the federal government.[56] When pollution caused by ocean dumping became a significant national problem, Congress enacted the Marine Protection, Research and Sanctuaries Act of 1972 [57] to protect the nation's seas and sea beds. This ocean dumping legislation created yet another approach to the problem of ensuring that environmental standards are met by federal facilities. A reading of Title I reveals a proscription against ocean dumping by "any person" not holding a permit pursuant to the Act. The Act defines person to include "any officer, employee, agent, department, agency or instrumentality of the Federal Government. . . ." [58] Section 101 prohibits

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[54] Oregon Administrative Rules, Ch. 340, §35–015(23) (1974).

[55] United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950); and United States v. Maine,____ U.S. ____, 5 ELR 20232, 7 ERC 1753 (1975).

[56] Submerged Land Act of 1953, 43 U.S.C. §§1301 *et seq.* and the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§1331 *et seq.*

[57] 33 U.S.C. §1401 *et seq.* (Supp. 1973).

[58] Section 3(e) of the Marine Protection Act, 33 U.S.C. §1402(e).

"any person" without the requisite permit from transporting material from the United States to the territorial seas or 12 miles beyond for the purpose of ocean dumping. A separate proscription, directed exclusively at federal agencies (*i.e.*, our overseas defense bases), bans the dumping of any material in any ocean waters if the material is being transported from outside the United States.

Within these proscriptions, the only avenue for those interested in dumping refuse into the ocean is a permit issued either by the Army Corps of Engineers for dredged material or by EPA for all other material. No exemption is made for federal agencies,[59] they must secure a permit in the same manner as anyone else. The permit process is described in the Act and the regulations issued by EPA and the Corps of Engineers.[60] Under the EPA regulations each applicant must provide basic information on what material he intends to dump and why. That application is made public and published in the local news media. If no objection is raised by the public or EPA, a permit listing restrictions and requirements is issued by the Regional Administrator. If, however, any person wishes to object, a public hearing will be held in that region to consider the contents and issuance of the permit. The presiding officer may recommend to the Regional Administrator whether to issue a permit or not, and what conditions, if any, should be imposed. This permit procedure is very similar to the water discharge permit system (NPDES) described earlier in Subsection A. The striking difference is that here the law clearly prescribes that a federal, not a state, agency shall issue the permits to its sister agencies. The problems of supremacy and sovereign immunity are thus avoided. Additionally, the hearing held is a public hearing, not an "adjudicatory hearing."

The enforcement procedures for the ocean dumping program are similar to the enforcement procedures for the NPDES. Section 105 of the Marine Protection Act provides for both criminal and civil penalties. Interestingly, despite the inappropriateness of both these sanctions to federal agencies, they are not exempt from either. Revocation of the permit is one viable enforcement option, but a more realistic alternative insofar as federal agency violations are concerned is the use of injunctions. Moreover, "any person," including state and local officials, can bring a citizen suit action against any federal agency or official for alleged violations of the Act or permit conditions.[61]

F. Pesticides, Radiation Control, and Safe Drinking Water

The last areas of concern addressed in the executive order are pesticides and radiation. Both are somewhat unique, are distinct from the previous five categories, and merit the special statutory and regulatory treatment they receive.[62]

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[59] An unresolved question is whether a loophole exists in §107(b), which authorizes the Administrator or Secretary of Army to delegate some or all of their permit authority to other federal agencies.

[60] 40 C.F.R. 220–227, 38 Fed. Reg. 28610 (Oct. 15, 1973). *See* also the U.S. Army Corps of Engineers' procedures at 33 C.F.R. 209.120, 39 Fed. Reg. 12118 (Apr. 3, 1974).

[61] Section 105(g) of the Marine Protection Act, 33 U.S.C. §1415(g).

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) was a response to the problems caused by use, mis-use and over-use of pesticides. This act has been substantially revised by amendments since enacted in 1942. The latest and most important amendment is the Federal Environmental Pesticide Control Act of 1972 (FEPCA).[63] The main innovation of FEPCA was to give EPA authority to require registration of pesticides. It compels the manufacturers of pesticides to apply for and receive EPA registration and permission to distribute and sell their pesticides. While these provisions do not affect federal facilities directly, they do fall within the Act's provisions for enforcement against users of unregistered pesticides. To these provisions, however, there are two important exemptions applicable to local, state, and federal agencies. First, "any public official while engaged in the performance of his official duties" is exempt from the general coverage of the Act.[64] Second, there is a broad exemption from the ban against use of unregistered pesticides where the user is a federal or state agency. Section 18 provides authority for the Administrator of EPA to exempt any such agency whenever he determines emergency conditions exist which require such exemption. The Administrator has implemented that authority by promulgating rules for administering the exemption.[65] These exemptions are rarely used. Instead, an agency may quietly urge EPA to register the pesticide in question, or grant an experimental use permit under §5.[66]

One other federal facility involvement does arise with respect to §4 of the Act. That section requires pesticide applicators to be certified pursuant to federal standards, either implemented by EPA or by EPA-approved state certification programs. Certification is required whenever the applicator is applying a pesticide registered for restricted use. In response to these provisions, EPA's certification rules establish a Government Applicators Program. Under this program, federal employees receive forms upon completion of a federally-sponsored training course. Each state then either indicates blanket acceptance of persons with such credentials, or requires additional state level training courses.[67]

In sum, it appears that pesticide problems, which affect air quality, water quality and solid waste management, are best treated with a compliance program distinct from air, water, solid waste, noise or ocean dumping problems. That is not to say special treatment, loose control or other problems should be tolerated. Rather, it seems clear that pesticide control is best focused on manufacturers, none of which are public entities. The certification of applicators and the enforcement procedures to prohibit use of unregistered pesticides are clearly subsidiary measures.

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[62] Radiation is not only unique, but also extremely complex; the specific statutes and regulations controlling that subject require study and clarification on their own terms and will not be examined closely here.

[63] 7 U.S.C. §136 *et seq.* (Supp. II, 1972).

[64] Section 12(b)(3) of FEPCA, 7 U.S.C. §136j(b)(3).

[65] 40 C.F.R. 116.

[66] *See, e.g., Environmental Protection Agency-Recent Developments*, 5 ELR 10060 (Apr. 1975), 5 ELR 10164 (Sept. 1975).

[67] 40 Fed. Reg. 11698 (Mar. 12, 1975).

As for radiation, it is also sui generis. The problems associated with radioactive material arise in air, water and solid waste. For that reason, they are more akin to the problems encountered in the pesticide area than the others covered by the executive order. The national defense aspects of radioactive material further complicate any enforcement technique. Thus it is not surprising that EPA has a limited role [68] in this area which is subordinated to the general responsibility of the Energy Research and Development Administration (ERDA) and the Nuclear Regulatory Commission (NRC), previously the Atomic Energy Commission.[69] It is fair to conclude that radiation is a unique pollution problem that merits special attention outside the framework of this article.[70]

An eighth area of concern is safe drinking water. The Safe Drinking Water Act,[71] enacted December 16, 1974, contains federal facility compliance requirements which are somewhat different from all those previously discussed, but the fact that compliance procedures are as yet undelineated suggests that analysis at this time would be premature.

With this conclusion of these brief sketches of seven pollution abatement programs covered by the executive order, and the one to be developed, which are applicable to federal facilities, it becomes clear that at least five have substantially similar qualities, three have virtually identical statutory language and two have similar permit programs; yet no two have parallel administrative procedures. The next section will address the various issues that have arisen in this area to date. An effective uniform scheme of enforcement is also proposed.

III. Issues and Analysis

This section focuses separately on four major interrelated concerns. The first is the lack of a uniform statutory scheme ensuring federal facility compliance with environmental quality standards. The second problem is the inconsistent procedural options used to implement those three statutes which do have a uniform scheme for compliance. The third concern involves the minimum elements of procedural openness and fairness that should be provided in any new or continued permit system implemented to control pollution emissions by federal facilities. Finally, there is the constitutional issue of supremacy, the doctrine of sovereign immunity and the persistent, though unnecessary intergovernmental conflict pervading this whole area.

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[68] *See* §274(h) of the Atomic Energy Act, *supra* n. 19, as amended and transferred under Reorganization Plan No. 3 of 1970. §§2(a)(7), 6(2), effective December 2, 1970. *See also* FWPCA §502(6), *supra* n. 4; Marine Protection, Research and Sanctuaries Act, §3(c), *supra* n. 7; and National Environmental Policy Act, §102(2)(C), *supra* n. 6.

[69] Energy Reorganization Act of 1974, Pub. L. 93–438.

[70] The Tenth Circuit handed down a decision in late 1974 which further complicates this area. Colorado PIRG v. Train, 507 F.2d 743, 5 ELR 20043, held that the Administrator of EPA had the "duty of regulating the discharge of all radioactive material into the Nation's waters. . . ." The implications of this conclusion are interesting, if sustained on appeal. *Cf.* California v. EPA, *supra* n. 29.

[71] P.L. 93–523, to be codified at 42 U.S.C. §300f–j; ELR 41131.

A. Uniformity of Statutory Obligations for Federal Facilities

In three separate statutes dealing with air, water and noise pollution, respectively, Congress has inserted a section entitled "Federal Facilities." Each of these sections contains virtually identical language. In essence all require federal agencies to ensure that facilities owned or controlled by them comply with interstate, state and local pollution control requirements "to the same extent [as] any person." These sections are intended to attain two goals while reinforcing a third, equally important concept. The first goal is to ensure that pollution control begins at home; the second is an equal treatment standard for enforcing pollution control against private and federal facilities. The concept which is reinforced is the continued pre-eminence of state and local agencies with respect to setting and enforcing pollution control requirements.[72]

These goals and concepts are sound. With respect to the first, it is elementary that the federal intrusion into the province of pollution control, historically a state and local province, requires an effective commitment by the federal government to meet the requirements which it directly or indirectly imposes on private or non-federal enterprise. In fact, the leadership burden alone should dictate that the federal government set an example by promoting environmental quality.[73]

The second goal of these sections is equal treatment of federal and non-federal facilities. A looser standard, exclusively applied to federal facilities, corrupts federal integrity. For those citizens whose air is polluted or streams fouled or ears assaulted by a local facility, the ownership of the pollution source is irrelevant. An example occurred in the District of Columbia, when hearings were held concerning major sources of air pollution. Among the various facilities allegedly failing to meet their compliance schedules were the General Services Administration heating plant, the Naval Research Laboratory, and the Anacostia Annex and Naval Station. The public witnesses ignored the question of ownership of the facilities. They simply wanted the pollution abated.[74]

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[72] This congressional recognition of state and local responsibility is explicit and implicit throughout all three environmental statutes. *See, e.g.*, §2(a)(3) of the Noise Control Act, 42 U.S.C. §4901(a)(3).

[73] *See* 42 U.S.C. §4321 and E.O. 11752.

[74] *See* Proceedings of the D.C. Department of Environmental Services, In the Matter of Proposed Compliance Schedules of Major Air Pollution Stationary Sources in the D.C., February 28, 1974.

More important, the equal treatment concept is essential for those enforcing pollution control requirements. Their zeal, loyalty and effectiveness are integrally related to their ability to treat all violators alike. This fact can be illustrated well with two examples. First, consider the situation faced by a regional water quality control board which is attempting to clean up sources of water pollution, while a mammoth Defense installation and base is dumping nearly raw sewage near a local beach.[75] How long can one expect continued efforts to halt individual septic system violations while a neighboring facility, owned and operated by the federal government, obliterates any environmental gains that might occur. Second, consider an instance where a state water pollution official is attempting to write an effective compliance schedule for a facility owned by a large private corporation. The official knows and argues persuasively that six months is a reasonable time for the corporation to select, order, buy and install the necessary chlorine treatment equipment needed to control the pollution. Meanwhile, next door, a federal installation without any fear of sanctions for non-compliance or delay will agree only to a three year compliance schedule.[76] Its argument is based on the long budgetary cycle of its "corporate" owner, the federal government. These examples illustrate the problems faced by enforcement officials when compliance authority is unequal.

The last aim of the "federal facilities" sections is to support the continued preeminence of state and local governments with respect to establishing pollution control requirements. Although the federal government has become more visible and has established many of the minimum requirements of state and local pollution control standards, nonetheless, non-federal agencies continue to set the final requirements which must be met by the citizenry. More important, the state and local enforcement activity is clearly more extensive than the federal effort. Both in terms of manpower and dollars, local and state inspections, citations, response to complaints and ultimate prosecutions constitute the bulk of this nation's environmental protection enforcement program. Of equal importance is the unique quality of the environment within each state and local jurisdiction. This fact alone requires federal deference to environmental quality standards set by officials in these local jurisdictions. Federal views as to what level of smoke or wastewater is reasonable need always to be measured against the local concerns for maintaining their environmental quality.

It is appropriate to investigate why the above goals are found in only three of the five environmental areas. The omission in the ocean dumping area is understandable. There we address a problem more appropriately national in scope. The 1972 Act prescribing the method to resolve this and related problems confronting our national seas virtually abandoned the state and local authority over adjacent territorial seas by setting federal standards and delegating the permit-granting authority solely to federal agencies (EPA and the Army Corps of Engineers). Thus, the Act attains the two goals sought with the other "federal facilities" sections. It requires that federal agencies, like private enterprise, must secure a permit before dumping waste in the ocean. It also establishes a uniform standard for compliance by federal as well as private permittees. The only distinction is the nominal role assigned to state and local government. This distinction is reasonable in light of the lesser involvement non-federal governments have historically had in patrolling the territorial seas. Consequently, the omission of a specific "federal facilities" section in the ocean dumping legislation is reasonable and consistent with the goals set forth above.

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[75] *See* California v. Davidson, 1 ELR 20606, 3 ERC 1157 (N.D. Calif. 1971).

[76] Reported by Regional Engineer, New York State Department of Environmental Conservation, Region IX.

The omission of a "federal facilities" section in the Solid Waste Disposal Act is more difficult to comprehend. The regulation of solid waste disposal has been almost totally within the province of state and local jurisdiction. State and local governments have extensive statutes and regulations concerning solid waste disposal, yet under federal law they do not apply to federal facilities. Perhaps the rationale for the unusual approach taken by this Act is the limited involvement by the federal government in the regulation of solid waste disposal. But this justification must surely fall before the weight of the arguments presented above for imposing non-federal standards respecting air, water, and noise control on federal facilities. First, the federal government clearly has a leadership role to play. In fact, the major thrust of the Solid Waste Disposal Act is to promote research and develop improved models of solid waste disposal. Second, the concern over a double standard is just as vital here. A great deal of solid waste is disposed of by incineration, which is subject in part to local air pollution control requirements. Thus, for that method of disposal we have — statutorily at least — ended the double standard by enacting §118 of the Clean Air Act.[77] To avoid that double standard entirely, disposal of solid waste generated by federal facilities should be subject to state and local standards regardless of the disposal technique. The concept of continued pre-eminence by allowing state and local agencies to set the standards applies to solid waste as well as air, water and noise. Addition of a "federal facilities" section to the Solid Waste Disposal Act would properly honor the concept of continued pre-eminence of state and local pollution control and would further the goals of leadership and equal treatment of federal facilities.

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[77] *Cf.* Greater Anchorage v. Johnson, 4 ELR 20818, 6 ERC 1989 (D. Alas. 1974) where defendants, employees of a United States-owned railroad, disposed of telephone poles by burning them in violation of a local air pollution standard.

B. Administrative Procedure to Ensure Compliance

If it is agreed that federal facilities should comply with state and local environmental quality standards (except with respect to ocean dumping), attention may be turned to developing the best method or procedure for accomplishing that task. Several options are available. The first option, now being used, has been described at some length, *supra*. In short, OMB Circular A–106 implements Executive Order 11752 by requiring agencies to assess their pollution abatement needs and initiate plans along with the requisite budget requests; the special attention given to these requests virtually assures availability of funds and requires that funds be spent on the plans proposed. The procedure also requires a regular update of developments within each agency.

These procedures may appear adequate at the outset, but their weakness is that they rely on a premise which is too sanguine; the whole procedure depends on agency personnel taking the initiative to set the ball in motion. But, in reality, there are and always will be individual facility operators or other responsible agency officials who (1) recognize that not all the funds necessary will be provided (*e.g.*, operation and maintenance of new waste treatment equipment), (2) are pressed by other administrative concerns [78] or (3) are uncooperative and, consequently, will never address the problems or else will underestimate the needs.[79] On the other hand, some may seek to use the A–106 procedure to secure equipment unrelated to pollution control.[80] In either event, the OMB procedure overrelies on an incentive system — the carrot.

The need for an effective stick, administered by an agency other than the facility owner or operator, is fully recognized in the ocean dumping and water programs as evidenced by the statutory imposition of a compliance scheme (permits) to ensure federal facilities meet the standards. It seems reasonable to suggest that the same or similar procedures to ensure compliance be implemented in the programs for air, noise and solid waste as well. But what type of procedures?

In ocean dumping and water pollution the Congress adopted a permit system. Half the states have done the same with respect to air pollution by stationary sources. Although the time-honored process of investigation, citation and enforcement orders (whether by courts or administrative agencies) are alternatives worth considering, on balance the permit system seems preferable. Permit procedures require polluters to come forth with information in their applications which accurately states their present emissions in both quantitative and qualitative terms. The applications must also provide a schedule for compliance within the statutory deadlines, if present emissions are not within applicable standards. The merits of this approach are significant. Each facility is compelled to assess its own problems. Once compelled, some operators will comply merely upon knowing they do not meet the standards. Others, compelled at least to admit their non-compliance, will be forced to deal with the problem. In either event permits require facility operators to address their problem.

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[78] *E.g.*, A Veterans Administration Hospital in Canandaigua, New York, was out of compliance with local air pollution regulations for a long period of time. The hospital administrator blamed his plight on budget constraints.

[79] The Puget Sound Air Pollution Control Agency reports continued non-cooperation from the United States Navy. *See also* affidavits of the Executive Officer of the California State Water Resources Board, noted in California v. EPA, *supra* n. 29. Staff in the New York State Department of Environmental Conservation (Region VII) were summarily refused admission to the Seneca Army Depot until pressure was supplied from other federal officials.

[80] For example, an OMB budget examiner reported one instance in which the need to remove sewage from a ship was used as the basis for a request for funds for an entire new pier.

The permit system has been criticized often as fostering legalized pollution. Admittedly, a permit does allow pollution to continue, but a permit system also requires all polluters to spell out their present levels of pollution, rather than rely on isolated spot checks by enforcement agencies. More important, permits require polluters to develop plans and compliance schedules to meet the standards within statutory deadlines. The administrative alternatives are (1) a case-by-case approach, with many polluters never being investigated or compelled to comply, or (2) an unrealistic, total ban on emission of pollutants. The growing use of permits for environmental protection reflects an acceptance of the facts that, although they are not perfect and do allow a continued level of pollution, they are preferable to ad hoc enforcement or total bans. Permits provide information and secure prompt compliance schedules without closing down valuable facilities in a wholesale fashion.

An additional advantage to permits is the relative speed and ease of enforcement should the polluter fail to comply with specified conditions. Incomplete or inaccurate information results in refusal to grant a permit, and a permitless discharge is a prima facie violation of the law. Should EPA fail to prosecute that violation, the citizen suit provisions in most of these acts allow "any person" to enjoin the violator from further discharge of the substance at issue (air, water, noise or materials to be dumped in the ocean). Hence, any state or local official could utilize this provision to bring a quick and relatively sure-fire suit. Should a permit be issued and then the polluter fail to meet with a compliance schedule, again EPA or "any person" has a prima facie case for an injunction. Without permits, enforcement involves a lengthier procedure requiring investigation, compilation of raw data, and time-consuming administrative and judicial procedures. Moreover, such procedures involve fortuitous enforcement, unnecessary delays, with all burdens of proof on the enforcer, not the polluter.

These arguments, buttressed by the fact that permit systems have been implemented by Congress in the ocean dumping and water area and by most states in controlling stationary sources of air pollution, raise the question of whether it is worthwhile to develop permit requirements for federal facilities to ensure compliance with air, solid waste and noise control standards as well.

The answer depends in part on the technical problems which arise in measuring and predicting accurately the quality and quantity of pollutants that will be emitted by a given facility. The technologies needed to establish standards upon which a permit system can be based have progressed further in some areas than in others. The state of the art in water quality management appears to be up to the task. Ocean dumping offers no serious problems; when dealing with stationary sources of air pollution, there is a consensus in EPA and many state agencies that permits are practicable. Solid waste disposal is similar to ocean dumping and is already regulated in part by air quality requirements affecting incinerators; it is susceptible to measurement and prediction.

In short, a permit system would seem to be a substantial improvement to the regulation of nearly all aspects of federal facility pollution. Noise control is the only program for which the state of the art may not be sufficiently advanced to enable at least the use of permits, at least for the present. However, the regulation of the sale of new products that cause noise pollution is promising. On balance, it seems fair to assume that noise is technically no less susceptible to a permit system than air quality. Consequently, the use of permits should be kept in mind as experience is developed in the control of this area of environmental concern. In any event, this analysis concludes that programs should be established leading to permit systems to control air pollution, solid waste disposal, and perhaps noise pollution, contingent upon the technological ability to do so.

C. Resolution of the Intergovernmental and Constitutional Conflicts

The present system for ensuring federal facility compliance with environmental quality standards has created a strain on daily intergovernmental relations as well as judicial disagreement over issues of statutory interpretation and the constitutional rights of the states.

The cases referred to in this article are the tip of an iceberg of cool intergovernmental relations. The exasperation of state officials is reflected in the following conversation:

> Q: How does your state office deal with the environmental problems caused by federal facilities?
>
> A: We throw up our hands.[81]

In Puget Sound (State of Washington), the director of the local air pollution control agency is notorious for filing suits against federal facilities, despite repeated dismissals.[82] But the real antagonism is best revealed by conversations with state and local officials. The Attorney General's office in Tennessee is anxious to bring several actions, but may not for lack of sufficient staff and financial resources. Some state officials are not so ardently opposed to the existing federal procedures, but these officials often represent states with few federal facilities. For example, one Georgia State Health Department official indicated satisfaction with federal facility compliance with air and water quality standards. He conceded, however, that his state had few problems due to its smaller number of federal facilities.

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[81] Conversation with the Compliance Counsel for the New York State Department of Environmental Conservation.

To be sure, the primary causes of dissatisfaction are the instances of non-compliance that state and local officials observe. But substantial friction is also caused by the confused enforcement procedure. In New York, for example, for a time state officials requesting permission to make an environmental inspection were denied admission to an army base. Only after referral to several levels of different state and federal agencies was their inspection allowed. Consequently, state officials now refer problems to the EPA regional office on a regular basis, but have no certainty as to the result. Tennessee state health officials had less knowledge or faith in procedures of the regional EPA staff. California and Washington were so unhappy with the federal procedures that they brought suit in the United States Court of Appeals and won complete authority over the water discharge permit system for federal facilities.[83] This dissatisfaction over the present set of federal enforcement procedures should be resolved, if possible.

One effort at resolution has been litigation. As noted above, a few significant cases have either been decided or are on appeal.[84] The results of the court decisions are not in harmony. In general they address the question of whether non-federal permits can be imposed on federal facilities. This issue involves both constitutional law and statutory interpretation.

The principal questions of constitutional law concern the Supremacy Clause and the doctrine of sovereign immunity. The Supremacy Clause was carefully analyzed by Chief Justice Marshall over 155 years ago. In that classic case over the states' authority to tax the National Bank, he summed up the issue neatly:

> First, that a power to create implies a power to preserve. Second, that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. Third, that where this repugnancy exists, that authority which is supreme must control. not yield to that over which it is supreme.[85]

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[82] *E.g.*, Puget Sound APCA v. USVA Hospital, 4 ELR 20010 (W.D. Wash. 1973).

[83] California v. EPA, *supra* n. 29.

[84] *E.g.*, Kentucky v. Ruckelshaus, *supra* n. 31; Alabama v. Seeber, *supra* n. 34; and California v. EPA, *supra* n. 29.

[85] McCullough v. Maryland, 17 U.S. (Wheat) 316, 4 L.Ed. 579 (1819).

This principle is alive and well today. Circuit Judge Lively relied explicitly on this rationale and the Supremacy Clause in the Sixth Circuit decision to exempt the Tennessee Valley Authority (a congressional creation comparable to the National Bank of Marshall's time) from the permit requirements of the State of Kentucky.[86] In fact, the Supremacy Clause was also considered a major hurdle in the Fifth and Ninth Circuit cases on the same issue.[87] That hurdle was surmounted in these latter two decisions, but not in the *Kentucky* case.

The rationale for evading the Supremacy Clause is straightforward, as indicated by the *California* decision which invokes a line of Supreme Court cases holding that Congress may waive exclusive legislative jurisdiction over federal facilities so long as that waiver is explicit and not overly broad.[88] The court went on to conclude that §313 of FWPCA was an explicit and not overly broad waiver. Therefore the Supremacy Clause was not a bar to the state's program. The Sixth Circuit reached an opposite conclusion with respect to §118 of the Clean Air Act, which has virtually the identical language as §313 of FWPCA.

> In the absence of a clear congressional purpose to subject federal agencies to state regulation, the district court was prevented by the Supremacy Clause from granting the injunctive relief sought by the plaintiff.[89]

The Fifth Circuit, also confronted with §118 of the Air Act, held contrary to the Sixth Circuit, simply noting its disagreement with the Sixth Circuit:

> It is on the proper interpretation of §118 that we part company with the Sixth Circuit.[90]

Thus, for the present, two circuits are split over the supremacy issue with respect to the Clean Air Act, and a third circuit leans in favor of the conclusion that an explicit waiver exists, given its view of §313 of FWPCA. All these cases are presently before the Supreme Court.[91]

A second constitutional objection to the authority of the states to impose enforcement procedures on federal facilities arises from the doctrine of sovereign immunity. This venerable defense has come under increasing attack recently.[92] Nonetheless, it still has some vitality in the courts, and the Sixth Circuit relied explicitly on this doctrine in the *Kentucky* decision.[93] Again its conclusion was not followed in the Fifth Circuit, which held:

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[86] Kentucky v. Ruckelshaus, *supra* n. 31 at 1175, 4 ELR 20486.

[87] Alabama v. Seeber, *supra* n. 34 at 1247, 4 ELR 20797; California v. EPA, *supra* n. 29 at 967, 5 ELR 20214.

[88] The court cited several cases. Primarily relying on Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949); *see also* Paul v. United States, 371 U.S. 245 (1963); United States v. Sharpnack, 355 U.S. 286 (1958).

[89] Kentucky v. Ruckelshaus, *supra* n. 31 at 1176, 4 ELR 20486.

[90] Alabama v. Seeber, *supra* n. 34 at 1247, 4 ELR 20797.

[91] Kentucky v. Ruckelshaus, *sub. nom.;* Kentucky v. Train, No. 74–220 (*cert. granted* 43 U.S.L.W. 3499); California v. EPA, No. 74–1435 (*cert. granted* 43 U.S.L.W. 3674); Alabama v. Seeber, No. 74–851.

[92] The Administrative Conference, among others, has recommended its abolition. ACUS Recommendation No. 69–1:Statutory Reform of the Sovereign Immunity Doctrine. *See* also S–800 (94th Cong., 1st Sess.).

[93] Kentucky v. Ruckelshaus, *supra* n. 31 at 1175–1176, 4 ELR 20486. Citing *Larson*, *supra* n. 88, and Land v. Dollar, 330 U.S. 731, 738 (1947).

> Our determination of the meaning of §118 also forecloses this contention. . . . Little or no inference is required to conclude that §118 embodies a waiver of sovereign immunity.[94]

Other lower court opinions have wrestled with this question and reached inconsistent results. The United States District Court of Washington concluded that §118 was an inadequate waiver of sovereign immunity.[95] It then considered whether §304 of the same Act was sufficient. It held that §304 "is merely a clause preserving any previously existing statutory authority or common law rights, and therefore does not support the bringing of an action for an injunction against the U.S. or Federal facilities." The United States District Court in Alaska ruled to the contrary, concluding that §304 was a waiver of sovereign immunity, but for civil actions only.[96] The United States Eastern District Court of Wisconsin has also held §118 was a waiver of sovereign immunity.[97] These and other cases on point in the water quality area reveal substantial confusion.[98] It is doubtful that all of this confusion will be dispelled satisfactorily by the Supreme Court's review of the *Kentucky* decision concerning §118 of the Clean Air Act. Moreover, the issues are likely to arise anew as state and local officials implement the Federal Noise Control Act and their various state and local noise control regulations against federal facilities.[99]

Clearly, an alternative set of enforcement procedures is needed, both to eliminate a prevalent mood of discontent and to resolve a variety of inconsistent court opinions. One such alternative is for Congress to delegate express authority to a single federal agency (EPA) to establish enforcement procedures (preferably permits) which ensure federal facilities comply with state and local environmental quality standards. A statutory delegation of such authority would dissolve the question of federal supremacy and sovereign immunity. If federal permits were issued pursuant to state and local substantive standards for environmental quality, then most of the objections by state and local officials would be resolved, as well. In fact, as mentioned above, many state officials would welcome the removal from their shoulders of the burden of enforcing environmental quality standards against federal facilities. State and local officials repeatedly indicated in interviews with the author their willingness to transfer federal facility enforcement problems to an effective federal level enforcement program.

Several considerations support this suggestion for a federal enforcement program. Perhaps foremost among these is the notion that the federal government should tend its own fences. Why must an environmental program Congress has applied to federal facilities rely on state and local officials, plus interested citizens, to ensure compliance? Common sense in public administration suggests that the "front line" of enforcement be maintained by the level of government posing the problem. OMB Circular A–106 already imposes the responsibilities on federal agencies to assess problems, develop plans and budgets, and implement improvements. Sound management suggests that same level of government should investigate and enforce compliance as necessary. Should the federal government fail to police effectively its own facilities, there exists in four of these statutes a citizen suit provision which provides a "second line" of enforcement by non-federal officials or interested citizens. These citizen suit provisions are valuable for plugging holes that develop in a federal enforcement program, but they should not be relied upon as a primary source of surveillance and enforcement.

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[94] Alabama v. Seeber, *supra* n. 34 at 1248, 4 ELR 20797.

[95] Puget Sound APCA v. USVA Hospital, *supra* n. 82.

[96] Greater Anchorage v. Johnson, *supra* n. 77.

[97] Milwaukee County v. VA Center, 357 F. Supp. 192 (E.D. Wis. 1973).

[98] California v. Davidson, *supra* n. 75; California v. Stastny, *supra* n. 34.

[99] *E.g.*, Air Transport Assn. v. Crotti, *supra* n. 52, and City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 3 ELR 20393 (1973).

From an efficiency viewpoint the idea is also extremely attractive. It would relieve agencies with facilities nationwide from the multiplicity of compliance with forms and procedures created by each of 50 states, plus numerous local agencies. It would be a relatively simple matter to implement new enforcement procedures at EPA, given the existence and experience of (1) the Office of Federal Activities in receiving and reviewing budget requests from the agencies faced with needs for pollution control equipment pursuant to OMB Circular A–106, and (2) the ongoing issuance to federal agencies of NPDES and ocean dumping permits.

Adoption of this suggestion could alleviate some of the internal conflict at EPA concerning whether to use its authority to initiate suits against recalcitrant sister agencies; EPA would have a more amenable option. If it chose not to issue a permit due to excessive pollutant emissions or if it found a compliance schedule being violated, mere public notice of that fact would allow any non-federal official or citizen to commence a citizen suit with a prima facie case already provided. EPA need not engage in internecine legal warfare directly with sister agencies.

One major objection to such a proposal is perhaps overrated. It has been suggested on numerous occasions that federal agencies might vehemently oppose the delegation of authority to a single agency to issue or withhold vital permits for other federal agencies. The accretion of authority by one agency over the otherwise independent authority of other agencies is always a delicate concern.[100] That concern is magnified in direct proportion to the size and strength of the agencies involved.

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[100] The Civil Service Commission does possess authority over the personnel policies and actions of sister agencies. Similarly, the General Services Administration exercises certain control over the physical space and facilities of most agencies. Of course, the Office of Management and Budget exerts strong influence and some direct authority over agencies within the Executive Branch due to its supervisory role within the Executive Office. The Department of Justice also exerts some control over agency matters through its role as representative in most agencies' litigation and through its role as legal counsel to other agencies.

Here, we propose additional authority to EPA with a potential loss of flexibility at major departments that own or operate federal facilities (*e.g.*, Defense, Interior, HEW, Agriculture, Commerce). Several large administrations also have a vital concern (*e.g.*, VA, NASA, GSA). It is easy to anticipate major objections from these powerful executive branch members.

A few objections have already been voiced to EPA's growing authority and increased imposition of requirements on sister agencies. For example, the Tennessee Valley Authority has been quite vocal in its opposition to the air quality standards EPA proposed for State Implementation Plans. But the fact remains, most agencies have not raised major objections. In fact, the responses from agencies asked to comment on an earlier draft of this article revealed nearly unanimous willingness to accept the proposition of a single federal agency with the authority to enforce environmental quality standards.[101] With respect to the procedural requirements already imposed by EPA under the ocean dumping program, no formal opposition has arisen. No agency has yet challenged the permits issued. And there has been but one instance (in Region IV) where a federal agency opposed EPA issuance of water discharge permits. That opposition was quickly resolved. The agencies seem genuinely to favor a single enforcement agency at the federal level rather than a myriad of state and local enforcement program requirements.

D. Procedural Improvements in a Permit System

Under the present enforcement procedures to ensure federal facility compliance with environmental quality standards, problems exist with respect to public notice, opportunity for hearings and the role of the presiding officer at any hearings held. If EPA is to be given broader authority to issue permits, the difficulties in existing procedures should be resolved first.

1. Public Notice

The clearest illustration of the problems of adequate public notice may be found in the new EPA guidelines to ensure federal facility compliance with air quality standards. According to EPA, its regional staff are expected to negotiate a consent agreement with the recalcitrant federal facility without any public notice. In fact, except for the state agency with jurisdiction over the facility's pollution problems, no one is informed of what becomes a closed-door session to draft the consent agreement. Only upon completion of the agreement, for which state certification is not required, is any notice provided to the public. The EPA memorandum proposes that the completed agreement be published only in the *Federal Register;* no local publication is proposed.

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[101] *See* comments from the Department of Defense, Agriculture, Interior, *et al.* in files of the Administrative Conference. Also, note well that the Administrative Conference adopted Recommendation 75-4, particularly §1. (Appendix A).

It is interesting to compare this closed-door strategy with the experimental technique upon which it was based. EPA's Region III had explored the use of consent agreements for some time prior to agency-wide adoption of the policy. However, on those occasions which the EPA regional staff felt that negotiations would benefit from public involvement, local agencies and members of the interested public were invited to participate. Even that limited option for public involvement is now precluded.

It is noteworthy that the procedures required by Congress for issuing permits for ocean dumping and water discharges already provide public notice requirements for the application and issuance of permits.[102] Applications for permits are published in local newspapers and posted throughout the geographic area concerned, and mailed to any interested person, group or agency, whether they request specific notice of one permit or have filed a standing request. The thrust of these requirements is clear; to apprise the permit issuer of the views of any and all persons concerned and to provide the public with knowledge about the permit requirement and individual applicants. This approach recognizes that the public interest is best served when public business is done in the open.

It may be that negotiation of air quality consent agreements between state officials and private enterprise requires some degree of privacy. However, when dealing with federal facilities and federal agencies the clear trend is towards public notice, open meetings, and public disclosure of decision-making rationale.[103] Where agency proceedings are carried on pursuant to the Administrative Procedure Act's requirements for rulemaking and adjudication, broadened opportunity for public participation has been recommended.[104]

2. Hearings

A second problem in the existing permit procedures concerns the type of hearings that should be provided for applicant and public review of the permits issued. The ocean dumping permit procedures provide for an informal "public hearing." The water discharge permit procedures provide an option for both a public hearing (a little different from the public hearing in the ocean dumping program) and an "adjudicatory hearing."

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[102] 40 C.F.R. 222.3, 40 C.F.R. 125.32, respectively.

[103] *See, e.g.*, the Federal Advisory Committee Act, 5 U.S.C. App. I (Supp. II, 1972), and the Freedom of Information Act Amendments of 1974, P.L. 93–502, to be codified at 5 U.S.C. §552.

[104] *See* Administrative Conference Recommendation No. 71–6; Public Participation in Administrative Hearings with its underlying reports by Professor Ernest Gellhorn and then-Chairman Roger Cramton. Volume 2 ACUS Reports & Recommendations at 35, 376, and 422, respectively (1972).

Under the air quality compliance guidelines, as presently proposed by EPA, no hearings are provided for review of the consent agreement; both parties, EPA and the agency concerned, must agree, and the public has no opportunity for input or review. These variations raise questions needing analysis. Why are the procedures so different? Is one procedure preferable?

Generally, as argued above, the interested public has a valuable role to play in the permit evaluation process, and EPA would benefit by providing a structured forum in which to play it. Public hearings are one such forum, though many enforcement officials feel that environmental issues are far less popular than when they were more novel (circa 1969–72). Public hearings allow interested members of the public to submit data and views, not to mention venting their ire. In addition, with respect to non-complying federal facilities, the suggestion by enforcement officials that public hearings might be held strikes a responsive chord in the hearts of facility operators, administrators who must continue to administer a facility within the community which is invited to speak out at a public hearing. Awareness that there may be a public hearing on the permit at issue is a catalyst which encourages realistic cooperation by facility operators and their agency owners, who seldom wish to brave the adverse local publicity a public hearing can generate. Thus, even the potential of public hearings has a salutory impact. Hearings should be provided as an option within the procedure used to ensure federal facilities comply with environmental quality standards.

A tougher question is whether to provide, in addition to a public hearing, an adjudicatory hearing at the permit issuance stage similar to that provided for in the Administrative Procedure Act (APA).[105] The water permit system procedures now provide the option for an "adjudicatory hearing" similar to the APA hearing.[106] Such hearings are not specifically required by statute in other areas, but the developing case law, which requires a record for judicial review, may mandate their availability.[107] These hearings provide the applicant for a water discharge permit a formal review of any denial or imposition of a condition to which he objects.

The hearings were designed primarily to provide due process for private enterprise. Yet, for several reasons many private enterprise permit applicants are irate. This antipathy by the intended beneficiaries is worth considering. In essence, their opposition is based on the extensive cost and time involved in the hearings which, in their view, are merely a kangaroo court.[108] The presiding officer has no authority to determine issues of law. He makes no initial decision. He merely collects a record for review by the Regional Administrator of EPA. But the Regional Administrator, who frequently has already had some involvement with the initial permit proposal approved by his subordinate, is unlikely to be persuaded, without more, to reverse his decision or that of his subordinate. And the mere collection of a record of evidence without a conclusion is not likely to be very persuasive. Consequently, many applicants undertake the procedure only after deciding they need to pursue a total review to the level of the Administrator of EPA and, perhaps, then to the courts.

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[105] 5 U.S.C. §§554 *et seq.* (1970).

[106] 40 C.F.R. 125.36.

[107] Consider Wong Yang Sung v. McGrath, 339 U.S. 33 (1951), cited and discussed in Memorandum for General Counsel of EPA and General Counsel of CSC, from the Office of Legal Counsel, Dept. of Justice (June 5, 1973).

[108] Expressed at ABA/EPA workshop or the NPDES Hearings, Aug. 19, 1974.

Given the dissatisfaction voiced by private applicants, some overriding benefit must be identified before such a system is promoted for federal facilities for which due process is not required. If a federal agency head is dissatisfied with a permit denial or condition, he can always seek review within the Executive Branch directly, by seeing the Administrator of EPA or the President, if the facility is that important. In fact, Congress authorized an exemption in each federal facility section whenever the President determines "the paramount interest of the United States" requires one.[109] If on the other hand, interested members of the public are concerned over a proposed permit, they may seek a public hearing. If still dissatisfied with the permit, they have the option of pursuing the citizen suit provisions found in most acts. In conclusion, "adjudicatory hearings" for permits to federal facilities are not likely to be worth the effort. They are costly and provide too little in return.

Thus, it seems that public hearings are worthwhile, but adjudicatory hearings are not. It is interesting to note that the existing procedures for ocean dumping permits provide just that — public hearings but not "adjudicatory hearings," and that these same procedures were commended *supra* for their beneficial public notice requirements.

3. Recommendations by the Presiding Officer

Questioning the role to be played by a presiding officer of a hearing in a permit procedure may seem, at first, an odd concern. However, in the turmoil over the water discharge permit hearings, that issue has been central. It is also an issue of growing concern in other areas.[110] At present the presiding officer is not required to be an administrative law judge (ALJ) [111] in either the public hearings or "adjudicatory hearings." In public hearings the presiding officer is generally an attorney or a bureau chief from the EPA regional office. For "adjudicatory hearings" EPA has recognized the need for a presiding officer with more independence from the permit issuing staff and therefore has assigned only administrative law judges to be presiding officers. Their role is to conduct an orderly hearing and to collect evidence and testimony. Although, normally, administrative law judges also make recommendations for resolving the disputes before them to the agency officials, the water permit procedures do *not* authorize the presiding officer of an "adjudicatory hearing" to provide any recommendation. Instead, the presiding officer performs virtually all the duties required in APA hearings, yet his final act is merely to transmit a certified record and any proposed conclusions or findings of the parties, without his own views and opinions. He is not asked to provide his own recommendation.

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[109] *E.g.*, §118 of the Clean Air Act, 42 U.S.C. §1857f.

[110] *See* Rosenblum, Role of the Administrative Law Judge in the Administrative Process, Sept. 1975, A Report Prepared for the Administrative Conference of the United States.

[111] *See* §11 of the Administrative Procedure Act, codified at 5 U.S.C. §§1305, 5362, and 7521.

The role taken by presiding officers in ocean dumping public hearings is eminently more sound. The presiding officer over a public hearing under these regulations is directed to recommend approval, disapproval or specific conditions for the permit. The presiding officer hears and considers all the evidence and may judge the demeanor of each witness. Although an agency official, less independent than an ALJ, he operates in a position of neutrality. Because he is selected by the Regional Administrator due to his sound judgment and experience, it seems utterly foolish not to request his recommendations on the matters addressed at the hearing. This is true whether he presides over an "adjudicatory hearing" or a public hearing. The one possible concern could be that his recommendation, once made public, would make it difficult for the Regional Administrator to act to the contrary. This objection has no merit. If the Regional Administrator is unable to give a persuasive justification for a contrary decision, then he should accept the advice of the presiding officer, whose viewpoint is too valuable to be ignored for petty reasons.

The foregoing analysis leads to the conclusion that the present procedures of the ocean dumping permit system should be extended to other EPA procedures to ensure compliance by federal facilities with environmental quality standards by incorporating the ocean dumping requirements for (1) adequate, local public notice, (2) opportunity for a public hearing, and (3) recommendations from the presiding officer.

IV. Summary and Conclusions

The present statutory framework for addressing the problems of federal facility compliance with environmental quality standards is consistent for three significant environmental areas: air, water, and noise. In each case, the law requires federal facilities to comply with "Federal, State, interstate and local requirements respecting control and abatement of . . . pollution. . . ." This statutory requirement is designed to ensure that federal facilities are subject to pollution control programs at all levels of government "to the same extent that any person is subject to such requirements." This requirement makes sense. Each of these environmental concerns has been and still is primarily within the province of non-federal levels of government. Despite the increased involvement by Congress and the federal government, environmental protection remains primarily a local responsibility. The principle that federally owned or operated facilities should meet, respect, and comply with the local standards merits continuation.

One area, solid waste disposal, has not been incorporated within this statutory framework. Although solid waste disposal programs are less developed than air and water programs, it is clear that state and local standards should predominate in this field as in the others. Consequently, the principle in the air, water, and noise acts that federal facilities shall comply with state and local environmental control standards should be added by amendment to the Solid Waste Disposal Act.

The consistency obtained by this amendment should be further improved with respect to the enforcement procedures employed to ensure that federal facilities comply with the state and local environmental quality standards. At present each program, air, water, noise, solid waste disposal and ocean dumping, uses a unique set of procedures. The water quality act created a system which requires a permit for each discharger of pollutants into our nation's waters. Each state is encouraged under the Act to establish and implement such a permit program. Whether these state programs are authorized to require permits of federal facilities within their jurisdiction has not yet been resolved in the courts. Under the Clean Air Act, each state has set up its own enforcement procedures. One half of the state programs require permits for each stationary source of air pollution. The others rely on inspections, followed by administrative orders to abate any violation that is found. With respect to federal facilities, again the authority of the states is uncertain. One court of appeals held the State of Alabama may require permits of resident federal facilities. Another court of appeals held to the contrary for the State of Kentucky. A third has not yet decided a similar case pending before it. The two cases decided are being appealed to the Supreme Court. EPA has already developed its own unique compliance procedure which it would continue to use if the states are denied on appeal the authority to require permits from federal facilities. This procedure calls for inspection and monitoring of federal facilities for non-compliance. In those instances where a violation is occurring, the regional offices are directed to negotiate a "consent agreement" with the non-complying facility. Under the Noise Control Act, there is no enforcement program at the federal level and a variety of different state and local programs. Their authority over federal facilities is untested at present and therefore uncertain. Under the Solid Waste Disposal Act, EPA Guidelines have been issued for the use of all federal facilities. Since there is no statutory requirement that imposes state or local standards on federal facilities, these EPA Guidelines are the only requirements such facilities must meet. Unfortunately the Guidelines themselves admittedly fail to meet minimum standards in some states and localities and in addition no enforcement procedures exist to ensure that they are complied with.

These inconsistent and uncertain enforcement procedures have not proven satisfactory. Nor is there hope for an adequate resolution of the issues, without congressional action. Ocean dumping is a notable exception. When this pollution problem rose to a level of national concern, the Congress delegated nearly full authority to a single federal agency, EPA. The result is a permit program under which any person, including federal agency officials, who wishes to dump waste materials into the ocean must secure a permit from EPA. This system has proved effective and produced none of the legal uncertainty and intergovernmental conflict that arose with respect to the other environmental areas.

In light of the apparent success in the water discharge and ocean dumping permit programs, Congress should consider delegating express authority to EPA to establish and maintain enforcement procedures which will ensure federal facilities meet state and local environmental quality standards in each major program, including air, water, noise and solid waste.

Lastly, this examination has noted the inconsistent use within the present enforcement procedures of three sound administrative requirements: 1) adequate local notice, 2) an opportunity for a public hearing, and 3) recommendations from presiding officers at any hearings employed within the enforcement procedures. These elements exist and function well in the ocean dumping and the water discharge permit programs. They should be incorporated in the enforcement procedures developed for air, noise and solid waste disposal programs.

SUMMARY OF REPORT IN SUPPORT
OF RECOMMENDATIONS 75–5—75–10
ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE*

CHAPTER 1 — THE AUDIT AND SETTLEMENT PROCESSES

Selection of Returns for Examination

Congress has directed the Internal Revenue Service "to the extent . . . practicable . . . to proceed, from time to time, through each internal revenue district and inquire after . . . all persons . . . who may be liable to pay any . . . tax. . . ." The Service is further empowered to review books and records relating to tax returns. For the individual income tax, the Service has heeded the Congressional direction by each year examining some taxpayers' returns for accuracy and demanding substantiation of the entries on the return. Such examinations are called audits.

The Service does not have enough people to audit each of the 80 million individual income tax returns filed each year. Instead only a small percentage is examined. Such audits increase revenue, and also have a major purpose to induce "voluntary compliance" with the tax laws. The program of examinations to achieve this end appears to be based on the assumption that the public will be encouraged to comply if there is a credible possibility that any particular return may be audited.

To carry out these audits, the Internal Revenue Service has separated individual tax returns into seven classes, based on the level and kinds of income shown on the return. These classes are:

Level of Adjusted Gross Income and Other Characteristics	Return Class Designation
$0–$10,000 with only a standard deduction	Low income standard
$0–$10,000 without business income but with itemized deductions	Low income non-business itemized
$10,000–$50,000 without business income (usually with itemized deductions)	Middle income non-business
Over $50,000 without business income	High income non-business
$0–$10,000 with business income	Low income business
$10,000–$30,000 with business income	Middle income business
Over $30,000 with business income	High income business

If any amount of business income is reported, the return is classified as a

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*This Report was prepared by the Chairman's Office for circulation to the members of the Conference in connection with Plenary Session consideration of the five Internal Revenue Service Procedures recommendations. It is intended as an accurate summary of Davenport, *Administrative Procedures of the Internal Revenue Service*, Sen. Doc. 94–266 (1975) which was prepared under the auspices of the Steering Committee for the Internal Revenue Service Project. A memorandum by Sheldon S. Cohen, Chairman of the Steering Committee in support of an amendment to Recommendation 75–8 "Tax Return Confidentiality" is also included.

business return. A return with no business income but with very high amounts of investment income, such as dividends and interest, will be classified as a non-business return.

A projection of returns to be audited from each of these classes is determined at the beginning of each fiscal year and is communicated to Service personnel as the Annual Audit Plan. "The Plan" is a management projection developed by the national office with substantial assistance from management personnel at the district and regional offices. It unquestionably is management's most important tool for planning and monitoring the Service's audit activities, and its impact on the auditing process itself is substantial. Accomplishments toward fulfilling the projected goals are collected monthly, quarterly, and annually, and are tabulated by district. District management personnel use such statistics in monitoring the district's success in meeting its assigned objectives, and a desire to "make the plan" is naturally transmitted to and felt by those who do the auditing. What results is a sometimes subtle pressure on the examining officer to increase his productivity as measured by number of audits completed.

The selection of returns for examination begins at the ten IRS Service Centers, where returns are received from the taxpayer and reviewed manually and by machine, for math errors and obvious other errors apparent on the return. If errors (either in favor of or against the taxpayer) are detected, the taxpayer is notified by the Service Center, and the issues so raised are resolved with its personnel if possible. If not, the return may be audited.

The computer at the Service Center also gives every return a score for the tax change that might result from an audit of the return. A high score means there is a correspondingly high probability that an audit would result in either a significant increase or decrease of the tax liability shown on the return ("tax change"). The formula upon which such scoring is based is developed from the results of an intensive survey of sample tax returns known as the Taxpayer Compliance Measurement Program (TCMP).

This program, conducted in periodic cycles, consists of auditing a random sample of all returns filed in a particular year. From this sample, characteristics of returns which have significant tax changes are identified. These characteristics are then built into a formula called the Discriminant Function (DIF) which gives each characteristic and combinations of characteristics on a return a weight related to the amount of tax change found on the sample returns with similar characteristics. The total weight constitutes the DIF score, which purports to indicate the probability of a tax change if the return were audited.

In numerical terms, TCMP examinations are relatively insignificant. About 30,000 returns were examined under this program in the last cycle covering tax year 1971, a small number when compared to the more than 1.6 million taxpayers who were audited under other programs. However, TCMP examinations are exceedingly important to the Service, because they produce the data base from which the DIF formulas, used to select the ordinary tax return for audit, are developed.

Accordingly, to assure the highest degree of accuracy, examiners in TCMP audits are instructed to question every entry on the return and to pursue verification and documentation of each entry, until in the examiner's professional judgment it is accurate. These standards of examination are more stringent than are standards for other audits. TCMP examinations consume much more time than routine audits and put taxpayers to more inconvenience in supplying verification. As a result this audit, done primarily for research purposes, imposes considerable costs in time, money, and frustration on the taxpayer. Furthermore, since the sample is purely a random one, not geared to the potentiality of error, the cost of improving the audit system as a whole is largely borne by those unfortunate and presumably faultless taxpayers who are selected for intensive audit under the TCMP.

Thus, this program, though clearly a valuable one, can be a source of annoyance and irritation for taxpayers who fall into it. While the Service has generally assigned examiners of above average capabilities to conduct these audits, such audits might be further expedited and made less inconvenient to taxpayers if only the most skilled and experienced examiners were assigned to them. For this reason, *it is recommended* that the Service establish units of especially skilled examiners to perform TCMP examinations.

The DIF formulas developed from TCMP audits are applied to each return. The returns with the highest scores for each class of returns are held at the Service Center for delivery to district offices when returns are needed for audit. In the past few years about 60 percent of all returns examined were put into the audit pool by reason of computerized DIF scoring.

The remaining 40 percent enter the audit pool by manual selection under a number of general programs and other criteria. The programs are established by management in the national, regional, or district offices, and are based on return characteristics which are believed to indicate a high likelihood of noncompliance.

While some audits are performed by Service Centers, through correspondence, the majority are performed by one of the district offices, or their branches, scattered throughout the country. When a district office needs returns to audit, it will order returns from the Service Center servicing that particular office. Need is largely determined by the number and type of returns necessary to assure the accomplishment of the objectives prescribed by the Annual Audit Plan. The Service Center sends those returns having the program characteristics specified by the district as necessary for fulfillment of its assigned role in the Annual Audit Plan. Because of the need for further manual screening of returns sent to the district from the audit pool, the number ordered and received by the district is always greater than the number required for auditing under the Plan. The further screening to determine which returns are most suited for audit is manually done by the district's Returns Program Manager (RPM) and his staff. As a result of this review, some returns are judged not to require audit and are returned to the Service Center. When it has been decided that a particular return will be retained for further examination, a classification specialist determines whether its complexity warrants a field audit, by a highly skilled Revenue Agent, or only an office audit, to be performed by a less experienced Tax Auditor, who normally is provided a checklist of issues which he rarely goes beyond.

Once so classified, the return will be forwarded to the personnel who supervise the examining officers. These individuals are known as Group Managers. A Group Manager will screen each return he receives to determine whether he agrees with the RPM that the return is worthy of audit. If he does not, he will return it to the RPM who will then return it to the Service Center unaudited. If the Group Manager determines that a return should be audited, he will assign it to one of the examining officers on his staff who will then be responsible for conducting the audit of the return. This examiner may also independently review the return to ascertain whether it should be examined.

The foregoing has described the fashion in which most returns are chosen for audit; that is, they are routinely forwarded in batches by the Service Center to the district office and ultimately assigned to an examiner. Because several persons along the way consider the suitability of each return for audit, there is only a slight possibility that such Service personnel might abuse their screening power and exercise it maliciously or capriciously.

Other returns are individually selected for examination at the initiative of examiners in the district or branch offices. The examiner's discretion to requisition returns from the Service Center is relatively unchecked, and therefore presents a greater potential for abuse. For example, an examiner may, as a result of findings during an audit, decide that the return of another taxpayer should be examined. The Department of Justice may request that a particular return be examined. Or information suggesting that a taxpayer be audited may be sent to the Service from outside sources. In such cases, individual Service personnel exercise a high degree of discretion in deciding whether the individual returns should be examined. Indeed, the examiner may initiate the requisition entirely for reasons of his own. The examiner need only obtain his immediate supervisor's approval to request a return for audit. The reason for the request is indicated by a two-digit code. For example, if the requested return is said to be related to that of a taxpayer already under examination, the request is known as a "related pick-up," and the corresponding code number is indicated. However, some code categories are extremely broad or vague. The examiner's discretion is further enhanced by the fact supervisors generally seem to consider approval a mere ministerial duty. There exists, then, the danger that a return may be requisitioned for examination by reason of the whim or malice of an examiner. A similar potential for abuse lies in the examining agent's power to earmark the return of a taxpayer he is currently auditing for audit in a future year. Again, approval is perfunctory, and no directives require the supervisor to scrutinize the request for necessity and propriety.

There are several procedures that would discourage if not halt the misuse of such discretion. First, an examiner could be required to give a written explanation of his reason for requisitioning a return for audit. The Group Manager should review the written explanation to see that the request does not proceed from improper motives and is in accordance with established programs or criteria. Accordingly, *it is recommended* that each examining officer's requisition of a return be supported by written reasons, for review by his manager.

Second, if the Service carried out a systematic, ongoing evaluation of the reasons assigned for the selection of returns for audit, improper return selection could be restricted. *It is therefore recommended* that the IRS develop procedures to permit such verification, in a fashion that will simplify review by the Service's Internal Audit Division and facilitate Congressional oversight of the audit selection process. One such procedure was begun during the course of this study.

Third, Service personnel would be further inhibited from improper return selection if they knew that the taxpayer would be told the reason his return was selected for audit. To aid examiners and minimize arbitrariness, the Service should also require as far as possible that the selection of returns for the audit pool be made under programs and criteria established in advance. The Service would be more likely to establish such programs in advance if it is required to publish annual statistics showing the number of returns examined under each program or other criterion in each income class of returns. For these reasons, *it is recommended* that each taxpayer be notified of the reason that his return was selected for audit, that programs and criteria for selection be established in advance to the maximum extent feasible, and that the Service publish annual statistics pertinent to each of its selection programs and criteria.

Since many returns enter the audit pool by machine scoring and since many taxpayers have similar income and deduction patterns each year, the returns of some taxpayers get into the audit pool each year. They may slip through the various screening steps notwithstanding the fact that previous years' audits have resulted in little, if any, change in tax liability. The taxpayer would, perhaps because of some recurring peculiarity in his tax return that causes a high DIF score, undergo audit very often or even for many consecutive years. Taxpayers naturally find such recurring audits annoying. The Service has little reason to audit any particular taxpayer on a repeating basis, especially where only minor tax change is likely to result. Procedures which permit a review of prior audit history could prevent these repetitive audits. Accordingly, *it is recommended* that procedures be adopted which would require review of audit history by the Group Manager and examining officer before conducting a repetitive audit. TCMP audits should not be subject to such a review, however, since the failure to carry out a TCMP audit could impair the validity of the sample.

The Examination

Correspondence audits aim to resolve the simplest of issues by mail from the Service Center. When the examination is performed in the district or branch, returns presenting relatively simple issues receive office audits, conducted in the Service's offices. The more complex returns undergo field audits, performed on the taxpayers' premises where records about business or investment transactions are accessible.

The process of being audited is, for most taxpayers, a frightening and intimidating experience, occurring in a hostile and unfamiliar setting. It is largely the fear of the unknown that arouses such strong anxiety and, at some times, belligerence in the individual taxpayer who has been singled out for audit.

Despite sincere efforts on the part of the Service to lessen these apprehensions, the confrontation between the tax auditor and the taxpayer remains essentially an adversary proceeding. Its adversary nature is heightened by the differing attitudes of examiner and taxpayer. The examiner tends to believe that tax returns in general contain many intentional or careless inaccuracies. As to the particular return before him, he knows that it was probably scientifically selected by a computer. He also knows that the return has been reviewed by the RPM and the examiner's own manager, who is cautioned not to assign the return for audit unless convinced it should be. In the back of the examiner's mind is the knowledge that his failure to find a tax change in a large number of returns may result in a review of his returns or a discussion of his skills, or both. It seems significant that examinations have long been referred to as "enforcement activity." (The 1974 Annual Report, issued as this study was nearing completion, used the word "compliance" in place of "enforcement.") Thus, one may conclude that the average examiner comes to an audit with a disposition to find and assess errors against the taxpayer, whom he will tend to suspect of being careless, dishonest, or unknowledgeable.

Likewise, the taxpayer enters the fray with his own well-established notions and indignation at being called for audit. He also may be resentful about well-publicized tax law preferences, such as real estate tax shelters, or some real or presumed special treatment given to more prominent personalities. His irritation is compounded by the knowledge that the audit experience will cost him time and perhaps money in additional tax assessments or the need to hire professional help.

Further, the average taxpayer is bewildered by the complexity of the tax law and of the auditing procedures, and often learns only then of the degree of verification of items listed on his return that will be required. To reduce this lack of knowledge about the requirement for verification during audit, *it is recommended* that the Service annually include, along with the blank tax forms sent to taxpayers, information telling taxpayers: (1) that all supporting records should be retained for at least three years; (2) that an audit, if there is to be one, is not likely to commence for some time after the return has been filed, and (3) that receipt of a refund does not preclude audit.

Study of Motivations for Compliance

The Service regards the audit process as its primary implement to induce voluntary compliance with the laws requiring the filing of accurate returns and payment of taxes. The audit has generally been viewed by the Service as an "enforcement" function. It is based on the premise that noncompliance can be discouraged by creating the belief that any return may be audited. While this deterrent may operate in many cases, there may be other reasons that some taxpayers do or do not comply with the law. The law is complex, and compliance may elude even those who try carefully and earnestly. There may be techniques other than audit that would encourage greater compliance with the law. The Internal Revenue Service does not really claim to understand the complexities of the taxpayer motivations involved in compliance or noncompliance. Indeed, the Service's tendency to use statistics, relating to the number of returns audited and the resulting increased revenue, as yardsticks for the measurement of its yearly performance (as it often has done in Congressional hearings) raises questions about whether the Service has become too concerned with improved "production," rather than with the ways in which the audit process can best contribute to compliance with the tax laws. The Service has limited resources, and Congress has not to this time provided funds for a study that would evaluate various methods to measure and promote compliance with the tax laws. *It is recommended* that Congress provide funds for such a study.

The Settlement Process

A settlement as described herein encompasses any sort of practical agreement, between a taxpayer and the Service, to terminate factual or legal disputes, that usually have arisen during examination of a tax return. The Service officials' authority to settle, and the settlement procedures, differ with the successive levels of examination and appeal.

Although an examining officer is not supposed to engage in "issue trading" and is bound by the Service's position on questions of law, his fact-finding function necessarily requires him to determine such "ultimate facts" as arise, for example, in disputes over the value of property or the classification of income. This discretion does, in practice, give the examiner certain leeway to close a case by making and obtaining concessions. Many disputes are resolved at this level.

When he cannot reach agreement with the examiner, the taxpayer may pursue resolution through administrative appeals. (In an office audit, he may first seek an immediate informal conference with the examiner's Group Manager, though many taxpayers eschew such a conference because of a lack of preparation and/or representation at this point.) The taxpayer will receive a letter from the District Director notifying him of the proposed adjustments to his tax and informing him of his options. In general, the taxpayer may request a District Conference within 15 days (with further appeal to the Appellate Conference, if necessary), or he may bypass the District Conference and request an Appellate Conference within 30 days. Once the taxpayer exhausts these administrative remedies, or if he does not invoke them within 30 days of the District Director's letter, a statutory notice of deficiency is issued. The taxpayer then has 90 days to assert his right to file a petition with the Tax Court.

If the taxpayer chooses to seek a District Conference, his case will be reviewed by the District Conferee, an experienced examining officer. The District Conferee has full authority to decide factual disputes, but is bound by the Service's position on legal issues. Where that position is unclear, either the conferee or the taxpayer can seek technical advice from the national office. The conferee must generally decide for or against the taxpayer on each issue presented by the examiner's report. Like the examiner, he is supposed to refrain from issue-trading and is prohibited from deciding any "prime issues" (*i.e.*, important unsettled questions of law as listed by the national office). However, the conferee's fact-finding and issue-defining role allows him flexibility to decide issues in a way that the taxpayer will find agreeable as a basis of settlement. In cases involving less than $2,500 for a single year, the conferee is formally delegated the authority to entertain a settlement offer based upon his estimate of the overall hazards of litigation.

If the taxpayer does not settle his case at the District Conference, he may proceed to the regional Appellate Conference. The Appellate Conferee has the authority to settle any question of tax liability (with some exceptions), whether it involves issues of fact, law, or the hazards of litigation. The principal limitations on his decision-making power are that he must consult with the Service's Chief Counsel about prime issues, and must obtain the prior approval of the Chief of the Appellate Conference before he closes a case. If the Chief disagrees, the taxpayer is offered the opportunity for a further conference with the Chief.

If the case is still unagreed after the Appellate Conference, the taxpayer's next level of appeal is outside the Service, in the Tax Court. After a petition to that court is filed, authority to settle a case prior to actual litigation is shared by the Appellate Conference and the Regional Counsel's office. Once the Tax Court convenes the session in which the case is scheduled for trial, however, the Appellate Conference relinquishes settlement authority to the Regional Counsel litigating the case, who may settle, concede, or try the case, as he deems advisable.

Settlement Results and Their Variations

Disputatious taxpayers seem to fare better as they progress up the administrative settlement ladder. In 1971, for example, District Conferees settled for approximately 42 percent of the amount originally assessed by the examiners, whereas Appellate Conferees settled their cases at about 30 percent of the initial claim. Cases settled at the Tax Court level resulted in a 32 percent collection rate, while in cases actually tried by the court the Service collected 41 percent. These disparities are understandable because of the differing settlement standards and strategies employed at each level of the process.

Less understandable, though, are the significant geographical variations in settlement results, both at the District Conference level and the regional Appellate Conference level. In 1971, for instance, the Cincinnati District sustained only 19 percent of the initial assessments while the Newark District sustained 84 percent. Similar variations occurred at the Appellate Conferee stage. Of course some part of these disparities might be explainable by differences in examiner expertise, or by the degree to which different District Directors emphasize the preliminary informal conference procedure, but the extent of such discrepancies raises doubt about whether similarly situated taxpayers have been receiving substantially equivalent treatment in the audit and settlement process. The Service, to its credit, has adopted a number of procedures aimed at encouraging increased consultation and uniformity within and among districts. However, in order better to inform itself as well as the public about settlement variations, *it is recommended* that the Service should annually publish an analysis of a representative sample of District and Appellate Conference settlements. Such a study should provide more than cold statistics, and should develop its analysis from examination of individual settlements involving the most commonly controverted issues. It should analyze the "recovery ratio" with reference to the factors of (a) amounts of tax involved, (b) whether or not the taxpayers were represented, and (c) patterns of geographical variation.

The recommended study ought to shed light on the reasons for the tendency of the Service to settle cases involving large sums of money for a lower percentage of the proposed assessment than cases involving relatively small sums of money. This phenomenon no doubt can be explained in part by the simple observation that the larger assessments will be resisted more tenaciously by the taxpayer, whose threat of appeal and suit is more credible. This tendency undoubtedly is also related to the tendency that the quality of the taxpayer's representation increases as the amount at issue increases.

Qualitative disparities in representation are bound to occur, but the handicaps borne by the wholly unrepresented taxpayer, in both the audit and settlement processes, are more troubling. Although the Service has made efforts to promote objectivity on the part of its examiners and conferees, and has instructed them not to take advantage of the unrepresented, the unrepresented taxpayer is nevertheless at a great disadvantage in the essentially adversary audit and settlement processes. Adversary proceedings work well where the adversaries come to the table with approximately equivalent skills. Clearly, the taxpayer who enters audit with a representative will be the better prepared to refute the examiner's assertions of law and fact. Conferees are drawn from the ranks of examiners, and the written record before a conferee is prepared by the examiner in the case; for a variety of reasons, the record may be tilted against the taxpayer. In addition, the intricacies of the settlement process itself will disadvantage the unrepresented taxpayer who has not mastered the distinctions among the 15-, 30-, and 90-day letters, or among the several levels of settlement authority. He is likely to be wholly unaware of the nuances of negotiation strategies and the prevailing institutional attitudes toward the issues in his case. The unrepresented taxpayer is clearly overmatched.

This imbalance could be at least partially redressed by establishment of an organization to offer advice and representational assistance to some taxpayers. Accordingly, *it is recommended* that Congress establish a Taxpayer Assistance Center, independent of the Department of the Treasury, to offer advice, assistance and representation to certain classes of individual income taxpayers. The Center would advise and represent taxpayers in the preparation for and conduct of audits and appeals therefrom. The Center should be authorized to charge a reasonable and standard fee to taxpayers who have an ability to pay such a fee. For reasons to be mentioned presently, it is suggested that the assistance of the Center be made available to individual income taxpayers who have been notified that they will undergo examination of their returns by means of office or correspondence audits, in contrast to field audits.

Concededly, it would be a difficult task for Congress to draw an appropriate line between those who should have access to such assistance and those who should not. One approach would distinguish the predominant purposes of the service in its application of the audit function to various categories of taxpayers — whether the purpose is primarily to raise additional revenue or is primarily to maintain credibility in enforcement of the tax laws. Where the revenue motive is predominant, and returns in a given category are regularly expected to yield substantial additional revenue, it is also likely to be worthwhile from the standpoint of taxpayers in that category to endure ultimate audit rather than to file returns resolving all doubts in the government's favor. In categories where enforcement through deterrence is the predominant Service motivation, the nature of the returns may be such that the audit experience has no benefits but only burdens for the taxpayers.

One end of the spectrum is exemplified by the large corporate taxpayer. Such a taxpayer will engage in numerous transactions as to which the facts may be unclear and the law ambiguous; the uncertainties will tend to be resolved in favor of the taxpayer by sophisticated tax advisors. Although both audit and subsequent settlement proceedings are virtually inevitable, those proceedings are highly cost-efficient to such taxpayers. The amounts saved by filing returns that invite those proceedings will be expected considerably to exceed the costs of enduring them. Audits of this kind of return are also highly cost-effective to the Service, which realizes its greatest collections per hour of work for such returns. Substantial deficiencies are expected and in fact are assessed. Such returns seem to be audited primarily for revenue purposes rather than for enforcement purposes.

At the other extreme are non-business tax returns showing under $10,000 of income. Although audits of these returns are on the whole cost-efficient to the Service because they raise more revenue than the cost of performing the audits, they are not nearly as remunerative as other audits in higher income brackets. The audit of low income returns is justified by the Service's desire to maintain an enforcement "presence" at each income level, causing all groups to realize that they are subject to audit, and thereby inducing better compliance. But the taxpayer may view himself as the somewhat random victim of an enforcement program. He knows that his return is not likely to be much, if any, more inaccurate than that of his neighbor who was not audited. More important, the audit and appeal system is not cost-effective for this person. For the amounts involved, the cost of commercial or professional assistance in most cases will far exceed the potential saving in taxes. The taxpayer feels he shoulders the burden of audit for no benefit to himself, but merely to contribute to better general enforcement.

The line between giving assistance and not giving assistance would lie somewhere between these extremes. Until that line is authoritatively drawn in some other fashion, a practical division can be made by viewing returns subjected to field audits as generally being examined primarily to raise revenue, and viewing office and correspondence audits as being conducted primarily for enforcement purposes. Under the approach outlined, the latter category would be considered for assistance.

CHAPTER 2 — COLLECTION OF DELINQUENT TAXES

Congress has conferred drastic powers upon the Internal Revenue Service forcibly to collect taxes from delinquent taxpayers. By law, the IRS is authorized without an adjudicatory hearing, summarily to place a lien on, to levy upon, or to seize and sell any or all property and rights to property belonging to a taxpayer with a tax delinquency.

At the same time Congress has provided little guidance on how the IRS should use its collection powers. Nor has there been much judicial direction supplied by the courts. The result is a large body of discretionary authority given to the IRS to collect taxes forcibly. Inevitably, such discretionary power is not uniformly exercised and is open to administrative abuse. As a result, the exercise of the formidable collection powers at times poses troublesome conflicts between the right of the government to exact taxes and the property rights of the individual citizen.

The process leading up to forcible collection commences in the Service Centers in the course of routine handling of taxpayer returns. Although the overwhelming majority of citizens pay their taxes on time and in full, the IRS each year has an inventory of several million cases in which taxpayers either failed properly to assess their tax or to pay any of it or all of it in full. It is usually at the Service Center that tax error or payment omission is first detected, either through mathematical verification or manual sorting of returns.

In 1973, 77.7 million individual tax returns were filed. Slightly less than 3 million of them showed an unpaid balance due. Another 1.6 million revealed a tax deficiency after the Service Center's mathematical check. In all, 4.6 million individual returns indicated that taxpayer contact was necessary to collect the missing revenues.

Once detected, the errors or omissions trigger a series of Service Center computer-printed notices to taxpayers whose accounts show a balance due. As many as four such notices may be mailed to a taxpayer.

Notice and Demand

The initial notice advises the taxpayer of the amount alleged to be due, plus interest and penalties if any, and states that he can square his account within a specified number of days. If there is no response from the taxpayer, a second notice is sent within five weeks, reminding him of the tax due and advising that he "should pay (the tax) within 10 days of the date of this letter. . . ." If there is still no response, a third notice is sent in three more weeks. If there is yet silence on the part of the taxpayer, a so-called "Final Notice Before Seizure" is sent.

It is this Final Notice Before Seizure which, by formal notice of delinquency and demand for payment thereof, lays the legal groundwork for subsequent imposition of the Service's potent summary powers of collection. The present practices of the Service in regard to this notice create the possibility of unfairness and unnecessary irritation for the taxpayer.

No forcible collection action should be initiated against a delinquent taxpayer without actual notice that it may occur. In view of the uncertainties of mail delivery and the treatment commonly given to computer-printed communications, the Service should take reasonable precaution to assure that the taxpayer actually has received such notice and appreciated its significance. To this end, *it is recommended* that the Service experiment with sending its "Final Notice Before Seizure" to the taxpayer by certified mail, return receipt requested, before any forcible collection action is initiated.

Although the Final Notice advises the taxpayer that salary and wages will be levied and any assets, income, or other property may be seized "10 days after the date of this letter," in practice it is usually more than two months before a delinquent taxpayer hears anything more from the IRS. This delay in carrying out a threat raises problems for the Service in future dealings with a delinquent taxpayer. The failure to exercise levy or seizure in the time specified may tend to create indifference, even if the notice is later reinforced by telephone or through personal contact. After passage of the eleventh day, the taxpayer may assume that the time for levy or seizure has passed and consequently be stunned when it does occur as late as two to four months after the Final Notice. When such summary action does indeed occur, the taxpayer predictably may react with anger, surprise, and a feeling that the Service is treating him unjustly. Such potential for aggravation of taxpayers raises serious implications for a tax system that relies heavily on voluntary compliance.

To offset the potential for such negative taxpayer reactions, *it is recommended* that the "Final Notice Before Seizure" be revised to indicate that forcible collection action may be taken *at any time* after the expiration of the 10-day period following the date of the notice, and to *emphasize* that this may be done without further notice to the taxpayer.

If the computer-printed notices do not produce payment, a Service Center automatically will issue a Taxpayer Delinquent Account (TDA) for any deficiency above a specified minimum dollar amount set by the Service. The TDA is forwarded to the District Office, where it is screened by the Office Branch, which attempts to collect the tax from the taxpayer through office interviews, correspondence or limited field contact. Three out of four delinquent taxpayer accounts are settled in the District Office without application of any of the Service's formidable forcible collection powers.

In principle, no Final Notice Before Seizure should be sent to a taxpayer unless it is clear that the circumstances will warrant the application of levy or seizure power. Since these notices are computer-generated by

Service Centers without benefit of the sort of investigation of a taxpayer's circumstances that can be undertaken by the District Office, many Final Notices in response to which the taxpayer does not promptly pay his account will in fact not be followed by a decision to seize the taxpayer's property. Since decisions to seize property are not automated, but made by Service personnel on a case-by-case basis, the timing of the decisions is far from uniform, nor is it as prompt as the Final Notice Before Seizure implies it will be, i.e., 10 days after. The longer the interval between the mailing of the Final Notice and the initiation of forcible action to collect the tax, the greater the possibility of surprise to the taxpayer and resentment by him when forcible action is actually taken. The Service should treat any final Notice as "stale" if, within some period (such as 120 days) after it is received by the taxpayer, no levy or seizure action has been taken to collect the tax due. Thus, *it is recommended* that the Internal Revenue Service arrange for the District Office to provide additional actual notification to the taxpayer that levy or seizure will follow 10 days thereafter in all cases when no such action has been initiated for an unusually long interval, such as 120 days, after the delivery of a Final Notice Before Seizure. Such additional notification might be attempted by telephone or personal contact and failing that by certified mail, return receipt requested.

Liens

In legal theory under the tax code, a lien in favor of the government arises against all taxpayer property and rights to property, whether real or personal, the moment the Internal Revenue Service assesses any tax liability against a taxpayer. The tax code also seems to provide, still as a matter of theory, that the lien attaches the moment, following a demand for payment of the Service-assessed tax liability, when the taxpayer "neglects or refuses to pay the same." For any practical purpose, it appears that a lien, in the amount of the assessed tax liability, only takes priority over the rights of third parties when the Service files for official public record a notice of the lien. When notice of a lien is filed, generally speaking in places prescribed by state law, the lien becomes an encumbrance on the taxpayer's property which very substantially reduces his ability to make legally effective dispositions thereof. The intended effect of filing a notice of lien is to assure that taxpayer property will be available, either from the taxpayer or from a third party transferee, to satisfy the taxpayer's tax liability. However, serious issues are presented which relate to the timing of lien notice and the duration of liens.

The Service intends that notice of a lien should be filed for the record only after reasonable efforts have been made to contact the taxpayer in person to give him a chance to pay what he owes. Even then it should be filed only if it appears that collection of the delinquent tax might be jeopardized by failure to record the lien. When notice of a lien is filed, the public can become aware of the taxpayer's difficulties, and he may, as a result, not only become disabled from raising funds to pay the tax liability, thereby actually impeding collection, but also suffer unintended and unnecessary personal disadvantage. Service guidelines recognize this risk but leave to the almost unfettered discretion of the Revenue Officer the difficult decision as to whether and when to file notice of a lien. Understandably then, there may be wide and inequitable disparity in the practices of Revenue Officers in filing lien notices. Accordingly, to assure greater uniformity in IRS lien notice filing practice and to minimize unnecessary adverse effects on taxpayers, *it is recommended* that the Internal Revenue Service provide specific guidance to make the determination as to whether and when to file notices of liens.

As a matter of legal theory under the tax code, a tax lien continues until the tax liability has been satisfied or has become legally unenforceable; the tax code authorizes release of the lien then or when payment of the tax liability has been secured by a bond. The practical effects of a lien of which notice has been filed in a public record are likely to persist until a certificate of release of the lien has been filed wherever the notice of lien was filed. However, there is no assurance that this will take place. Since the Service has no legal obligation, procedure, or practice to notify a taxpayer when a notice of lien is filed, he may not know it and may, therefore, not seek a formal release certificate — or, if he does, may not know where to file it. Furthermore, nothing mandates the Service to initiate release of a lien, to notify the taxpayer if and when it does so, or to file a certificate of discharge wherever notice of a lien was filed. Nor has the Service adopted a regular and reliable practice of doing any of these things. There can be no possible justification for a taxpayer to have to suffer disadvantage, embarrassment, or other inconvenience due to the persistence of a shadow on his clear interest in property created by a recorded lien that has not been discharged on the record. Accordingly, *it is recommended* that the Internal Revenue Service adopt procedures that will notify a taxpayer whenever notice of a lien is filed against his property in any public record and that will provide, without application by the taxpayer, for the recording of a certificate of discharge of any such lien, upon its release, wherever notice of the lien was filed.

Levies

A more powerful instrument available to the Collection Division of the IRS to collect delinquent taxes is its levy authority.* Although it is imposed in the cases of only a small number of the taxpayers who have failed to meet their tax obligations, those with regard to whom it is imposed frequently suffer severely. In the fiscal year ending June 30, 1974, 582,701 notices of levy were made.

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*In the tax code, the term "levy" is used to include both levy and seizure; in the lexicon of the IRS levy is generally distinguished from seizure. The distinction made by the IRS is followed herein.

The levy procedure is applied to third parties, such as employers, stock brokers, insurance agents, and bankers holding any asset — usually liquid — owned by the taxpayer. Levies attach to earned salaries and wages, bank accounts, investment accounts, and all accounts receivable. The third-party served with notice of a tax levy is obligated to surrender the property on demand. If he refuses, he is held personally liable for the tax due, interest charges, costs, and penalties, unless he has a reasonable cause for his refusal.

A court judgment or court order is not required before the imposition of a levy, nor is notification of the taxpayer required, beyond the computer-printed Final Notice Before Seizure, except in cases where his salary is to be garnished.

As in most summary actions, the Revenue Officer has enormous discretion in deciding to impose a levy. The Service instructs only that his action be "judicious" in the application of levy. But judiciousness is interpreted differently by different members of the IRS and in some cases in such a manner as to preclude the delinquent taxpayer from paying voluntarily. The Service suggests but does not require that the officer contact the taxpayer to advise him of the possible consequences. One of the few restrictions the officer faces in deciding when to exercise levy is a requirement that he consider the impact his action may have in what the Service refers to as "significant" cases, i.e., those which might cause embarrassment to the Service by adversely affecting large numbers of innocent third parties whose circumstances would be disrupted by levy action. Examples would be levies in case of a hospital, a newspaper, or a large, "viable" business. Avoiding levy in such cases, while perhaps saving the IRS potential embarrassment, does not constitute even-handed treatment of all taxpayers in similar tax-delinquent situations. Accordingly, *it is recommended* that the Internal Revenue Service establish guidelines that will assure judicious and even-handed application of the levy power and that will specify the circumstances constituting a reasonable opportunity for the taxpayer to pay his tax liability to avoid levy on his property.

The Service directs its Revenue Officers that levies should not be used in cases where undue hardship for an individual taxpayer would result. While the Service thus expects a Revenue Officer to consider the impact of his action, it provides no workable definition of what constitutes hardship beyond archaic formulas laid down in pre-inflation times. Lack of direction has left individual Revenue Officers free to make such determinations on a widely varying and arbitrary basis. *It is recommended* that the Internal Revenue Service establish more specific criteria and procedures to make application of the undue hardship principle more uniform. There should be criteria for common necessaries of life, including food, housing, clothing, and transportation, and provision of clear advice to the taxpayer as to what information and documentation are needed for the Service to make a determination of undue hardship. In addition, the Service should allow a minimum subsistence exemption from the initial levy on the salary or wages of a taxpayer being subject to levy for the first time.

Seizure and Sale

The power of the Internal Revenue Service to seize a taxpayer's property for sale is virtually absolute. Seizure may be made to collect taxes, interest, and additions to the tax in the form of penalties.

There are very few seizures of property in comparison with the number of lien notice filings or levies on wages and salaries and other liquid assets. Seizures are imposed in case of well under 1 percent of taxpayer delinquent accounts; they are ordinarily applied to tangible property in the taxpayer's possession. The exercise of seizure power has been delegated to journeymen Revenue Officers. There is no requirement for the Revenue Officer to give specific prior notice of seizure to the taxpayer beyond the general warning contained in the Service Center's computer-printed Final Notice Before Seizure. There is no requirement that the Revenue Officer seek approval of his superior before he seizes property, although he often does so in practice. There is no requirement that seizure of an individual taxpayer's property be made on a last-resort-basis as there is in case of delinquent business taxpayers. Consequently, Revenue Officers have broad and essentially unguided discretion in deciding to exercise this confiscatory power.

From the time property is seized, the Service becomes responsible for the seized property until it is sold and may incur expenses, such as insurance or guards, to protect it. The proceeds of sale of seized property are applied first, to pay the expenses of seizure, protection, and sale of the property, next, to pay any specific unpaid Federal tax liability on the property itself, and finally, to pay the delinquent tax of the taxpayer on account of which the property was seized and sold.

Before a sale, the Revenue Officer must, subject to his Group Manager's approval, fix a minimum sale price for the seized property. This is a difficult decision and an important one for both the Service and the taxpayer. If the highest bid at the sale is less than the minimum price, the property must be bought by the government at the minimum price, which thus becomes the sale proceeds to be applied as explained above. Except in case of property consisting of listed securities, present IRS policy governing the fixing of minimum sale price is confusing and hard to apply. Its aim is to protect both the taxpayer and the government. However, in many cases, it has failed to do one or the other, or both. In any case where the minimum sale price is set too high and no bidder offers as much, the government may end up crediting the taxpayer's delinquent account with more than it can get from resale of the property. Conversely, if the minimum sale price is set too low and no bidder offers as much, the taxpayer may see his property purchased by the government and resold to a third party at much less than it is really worth, with his tax liability reduced by much less than it should have been, given the value of the property. In the first instance, the government is the loser and the taxpayer gains. In the second case, both the government and the taxpayer fail to obtain adequate benefit from ultimate sale of the property.

As might be expected, the present Service guidelines, confusing as they are, lean strongly toward protecting the government. In spite of this, there have been many cases when the proceeds of sales of seized property have not even been sufficient to pay the Service's expenses of seizure, protection, and sale of the property. In any such case, the taxpayer's situation is worsened, with little or no benefit to the government, as a result of the Service's action.

Before a decision to seize property of a delinquent taxpayer is made, and before sale of seized property is carried out, it seems clear that the Service should be certain that the consequence of its actions will be a reduction of the taxpayer's delinquency by an amount that is fair both to the taxpayer and to the government. There should never be a case in which the proceeds of sale do not even cover the Service's expenses of seizure, protection, and sale, including properly accounted for salary and overhead costs which are now not part of the calculus at all. The Service's Internal Audit Division has criticized many seizures because they did not meet these standards and thereby created the appearance of taxpayer harassment.

The risk of imprudent and unfair seizures and sales is especially great when property to be seized is subject to an encumbrance with priority over the Federal tax lien for the delinquency involved. This makes it more difficult to fix a fair minimum sale price and to estimate what the character of bidding at the sale will be. In spite of these difficulties, it seems clear that the Service should never seize or sell a taxpayer's residual (after allowance for any prior encumbrance) interest in property, or "equity [in property] under the lien" as the Service calls it, unless the proceeds of sale will substantially exceed the Service's costs and expenditures.

Because the confiscation of any taxpayer's property can have drastic impact and unnecessarily adverse consequences for the taxpayer, it is vital that the decision to seize property be made with a view to assuring that the taxpayer is injured thereby as little as possible, consistent with the need to collect delinquent taxes. To this end, *it is recommended* that the Internal Revenue Service require that Group Managers, rather than Revenue Officers, make the decision to seize. Furthermore, the Service should require that as a condition to making the decision to seize, the Group Manager should determine, based on adequate evidence, that the proceeds of a sale of the seized property will substantially exceed the anticipated expenses of taking possession of, protecting, and selling the property. And finally, after seizure, the Service's procedures should call for returning promptly to the taxpayer any item of property as to which a determination can reasonably be made that the minimum sale price is unlikely to exceed such expenses.

A serious obstacle to formulating Service guidelines for the making of decisions about when to exercise the power of seizure and sale to collect delinquent tax accounts is the absence of adequate, systematic data about the Service's practices and their consequences. The Service has records of the number of seizures of property which it makes. However, it has no overall records of how many sales ensue, of the gross proceeds of sales, of its expenses of seizure, protection, and sale of property, of the amount of funds obtained from sales applied to reduction of tax liabilities, of the personnel and other overhead costs incurred in seizure and sale proceedings, of the number of or reasons for releases back to taxpayers of seized property. Ad hoc selective studies by the Service's Internal Audit Division have identified serious deficiencies in achieving the Service's own existing policy objectives in relation to seizures and sales. Thus, *it is recommended* that in order better to evaluate and execute its policies and procedures, the Internal Revenue Service should, at least from time to time, collect, tabulate, and analyze data relative to all the matters identified above.

Jeopardy and Termination Assessments

Of all the formidable powers at the disposal of the IRS to force the payment of an individual's delinquent taxes, perhaps none are more harsh than jeopardy and termination assessments.

Under normal circumstances, an additional tax asserted by the IRS, either as a result of return processing by the Service Center or as a result of audit, does not have to be paid by the taxpayer until after he has been issued a Statutory Notice of Deficiency.* For 90 days thereafter, the taxpayer has the right, prior to payment of the tax, to contest the deficiency assessment in the Tax Court. During this period, the Service may not take any formal action to collect the tax.

Under certain exceptional circumstances, when collection of a tax deficiency appears to be in jeopardy, the IRS is empowered by the tax code to collect forcibly unpaid taxes through jeopardy or termination assessment procedures, followed by seizure and sale, without any prior notice to the taxpayer. Although these procedures are applied to few tax delinquents, even their infrequent use has had crushing impact upon some taxpayers and has led to numerous charges of misuse of IRS power.

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*Additional tax due on account of purely mathematical error in the return may be assessed and collected without issuance of a Statutory Notice.

Despite the havoc which can be wrought by jeopardy assessments, the sole criterion specified in the tax code (Section 6861) to determine whether such assessment will be made is a *belief* by the IRS that collection of a tax deficiency "will be jeopardized by delay."

How is a taxpayer actually selected by the Service for jeopardy assessments? Until recently revenue agents, who are likely to be the prime movers in initiating such assessments, have been advised by the Service that "certain conditions and circumstances can properly be considered establishing prima facie cases" in which a jeopardy assessment should be made. These prima facie cases include: present and former major operators in the criminal field; bookies and gamblers; border hoppers; "individuals engaged in other activities generally regarded as illegal"; and taxpayers consistently suffering business or personal losses. Generally speaking, these classifications provide no factual basis for a belief that collection of any particular taxpayer's tax will be jeopardized by delay, and they thereby create a reservoir of discretion to initiate a jeopardy assessement without regard to whether collection of a tax deficiency actually is in jeopardy and to make an assessment which is undesirably large. Jeopardy assessments are supposed to be approved by District Directors who are expected to do so only if it appears that a taxpayer is about to hide himself or his property, to remove himself or his property from the United States, or to become insolvent. Service guidelines also call for jeopardy assessments to be used sparingly and to be made in reasonable amount, i.e., only the amount necessary to protect the government's claim for tax deficiency.

The total number of taxpayers subjected to jeopardy assessment has been small. In fiscal year 1972, for example, there were 375. In the first nine months of fiscal year 1974 there were 479. Nevertheless, the consequences can be disastrous for those individual taxpayers selected and whose assets are seized immediately. In one case a jeopardy assessment of $533,000 was made when the maximum tax liability was probably $58,000. In another case an assessment of $3 million was made after revenue agents had testified in a criminal case that the tax liability did not exceed $300,000. The impact of immediate seizure and inordinately high assessment tends to leave the taxpayer with very little with which to post a bond and in many cases reduces him to penury overnight. The jeopardy assessment may be of such magnitude as to force the individual taxpayer out of his home, destroy his business, and damage his reputation.

Although a jeopardy assessment and consequent seizure can be made without prior notice to the taxpayer, the Service is obliged within 60 days thereafter to send the taxpayer a Statutory Notice of Deficiency. By the time the taxpayer receives this notice it is likely, due to levy and seizure action, that he will not have the wherewithal to pay the asserted deficiency, which he must do as a precondition to contesting the assessment by a suit for refund in the U.S. Court of Claims or a U.S. District Court. However, when he receives the Statutory Notice, he may, without first paying the tax, contest the deficiency in the Tax Court whose jurisdiction is based only on notice of deficiency being given. The Tax Court can abate the assessment if it is excessive, withdraw it altogether if no collection jeopardy is found, and, of course, release any or all assets levied or seized. The impact of the jeopardy assessment may be so crushing as to make it difficult for the taxpayer to take advantage of his right to Tax Court review of the Service's action — but the right exists. The same is not true in the case of termination assessments as will be explained below.

As practiced by the Service, termination assessment is a summary collection tool more dangerously powerful than jeopardy assessment and subject to still greater potential abuse.

Under the tax code, one pre-condition to jeopardy assessment is that there be a tax defficiency. Until a taxpayer has filed (or should have filed) an income tax return, the Service cannot have a basis for finding that there is tax due. Before the end of a taxpayer's taxable year for income tax purposes (ordinarily the calendar year) and the date for filing his return (ordinarily April 15), no tax will be due and hence no tax deficiency could arise. And yet there are instances when the Service may need to act promptly before any tax is due, in order to safeguard from evasive taxpayer conduct its opportunity to collect taxes that will become due in the future. To meet this need, the tax code (Section 6851) empowers the Service without any prior notice, to terminate a taxpayer's taxable year at any time that it finds that the taxpayer "designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property . . ., or to do any other act tending . . ." to frustrate future collection of the current or preceding year's income tax. Termination of the taxable year has the effect of making immediately due and payable income tax for the current (or preceding) year and thereby creating the basis for the Service to assess a tax deficiency and move summarily (by levy or seizure) to collect it.

The tax code provision (Section 6851) authorizing tax-year-termination does not itself contain authority to make an assessment of deficiency. Hence, the Service's lexicon term "termination assessment" is misleading; more strictly speaking, one might say "assessment after termination."

An assessment after termination of tax year is potentially more damaging to a taxpayer than a jeopardy assessment because it may leave him with absolutely no judicial review recourse to contest the tax deficiency, the legality of the assessment (and consequent levy or seizure), or the amount of the assessment. The reason for this is that the Service does not issue a Statutory Notice of Deficiency in connection with a termination assessment. As a consequence, the tax-year-terminated taxpayer, whose opportunity to sue for a refund is as blighted as that of a jeopardy assessee, cannot even have access to the Tax Court.

The issue as to whether the Service is required by the present tax code provisions to give notice of deficiency of a termination assessment may soon be decided by the Supreme Court in two pending cases. Whatever the outcome of the decision, problems may remain, for both the Service and individual income taxpayers, whose solution will entail amendment of the tax code as well as alteration of IRS procedures.

In many cases the size of the assessment has been equal to the value of goods seized in police raids. The obvious conclusion is that its size is the result of pure guesswork. The Service, hence, has used termination assessments as a means of summary, extra-judicial punishment for criminality which neither the tax code nor the agency was established to impose. In any event, the size of the assessment is frequently in excess of the taxpayer's net worth thereby leaving him in a position unable to pay the tax and without access to the courts.

Although the tax code provision for tax-year-termination calls for IRS findings of taxpayer behavior which, if made, constitute presumptive evidence of jeopardy, the Service has given "prima facie" cases, referred to above, the same triggering significance for tax-year-termination as for jeopardy assessment. The availability of this basis for decision-making about both jeopardy and termination may have contributed to the prostitution of these powers to serve goals of criminal law enforcement unrelated, or very marginally related, to the collection of taxes as occurred, for example, in the so-called Narcotics Traffickers Program of the early 1970's. It appears that Commissioner of Internal Revenue Donald C. Alexander put an end to the program in 1974. However, there is no published evidence in IRS guidelines to indicate how the Service's procedures have been altered to help guard against renewed misapplication of IRS summary tax collection powers to some future anti-crime initiative. In order to help assure against improper exercise of these powers, *it is recommended* that the Internal Revenue Service promulgate procedures requiring that no jeopardy or termination assessment be imposed except upon determination made by a District Director, based on substantial evidence, that a tax is due and that its eventual collection is jeopardized.

The so-called Anti-Injunction provision (Section 7421) of the tax code sweepingly limits the power of the courts to issue injunctions against the Service's use of jeopardy and termination assessments. Its purpose is to permit the collection of revenues without interference by the judiciary.

This provision has been extremely effective in limiting taxpayer redress in the courts for jeopardy assessments. The IRS has strained to block any judicial review of termination assessments through this statute but its success in the courts has been mixed in barring relief for taxpayers caught up in termination assessments. Part of the reason for the mixed results in termination assessment court cases is due to taxpayer assertions that they are entitled to receive a Statutory Notice of Deficiency and thus be able to petition the U.S. Tax Court for redetermination of their tax indebtedness. If that position is correct, the Service would be unable, as a general rule, to sell property seized pursuant to the assessment until after the Tax Court rules. Final resolution by the Supreme Court of the question whether Statutory Notice must be given will have significance for taxpayers upon whom termination assessments are imposed.

The scant number of cases decided contesting jeopardy assessments have held that the lack of statutory guidelines against which to test the District Director's decisions precludes judicial review of his determination that jeopardy exists. As a result, taxpayers have found it difficult to derail jeopardy assessments on factual rather than technical grounds.

In order to prevent abuse of the authority to make jeopardy and termination assessments, *it is recommended* that the Internal Revenue Service establish and promulgate new procedures that will enable the taxpayer to contest the necessity and amount of such assessments at the earliest possible time. Additionally, the taxpayer should be furnished with full written explanations of the facts upon which the District Director finds that the collection of tax is or has been jeopardized and upon which the computation of the tax was based.

Alternatives to Forcible Collection

In form, the Internal Revenue Service's approach to collecting taxes from the delinquent taxpayer has an all-or-nothing quality — to demand all the taxes dues, and if they are not paid, to initiate forcible collection procedures. In fact, however, the IRS is not quite that rigid. The question is whether the Service is too rigid in its practices, particularly in a society and an economy that has grown accustomed to meeting obligations through installment payments — whether the Service might not collect more revenues from delinquent taxpayers by adopting more flexible procedures of exacting payments. In examining this question, it is necessary first to examine the magnitude of delinquent payments and the success of the Service in recovering them.

In 1973 at least one delinquent tax notice was mailed to some 7,380,000 individual and business taxpayers. However, only 2,746,000 accounts were subsequently forwarded to District Offices in the form of a Taxpayer Delinquent Account (TDA). While most of the remaining 4.5 million delinquent taxpayers satisfied their outstanding tax obligations in full without the issuance of a TDA, some 817,125 neither paid their bill nor advanced to TDA status. In the latter cases TDA's were not issued because only small tax balances were due. This procedure, known as "deferral" by "dollar tolerance" enables the IRS to concentrate its limited resources on collecting larger delinquencies.

Despite their deferral, however, experience has shown that most of the delinquencies will be collected eventually — either as offsets to future tax refunds, as voluntary payments, or because the addition of subsequent liabilities, accumulated penalties and interest charges raise the amount above the tolerance level, leading to collection action. In the meantime, the taxpayer is reminded at six-month intervals of the outstanding tax. At least six years will pass before the debt is barred by the expiration of the statute of limitations.

Not all small delinquent tax accounts, however, are deferred. IRS employees are exempt from having small delinquencies deferred as are taxpayers with a TDA already outstanding and those who have been coded for "special handling" on the basis of a history of resisting payment or habitual delinquency. Tax returns of resisters and chronic delinquents with a balance due as small as $25 are coded and forwarded to the district office as targets for quickly executed lessons in forcible collection. Service efforts to collect small accounts from chronic delinquents are not cost-justifiable in dollars and may be an inadvertent reflection of excessive concern about tax law enforcement. Collecting small sums from resisters is considered to be an essential policy of the Service.

The tax code, while enumerating a number of methods for forcible collection of delinquent taxes, is silent on the payment of delinquent taxes by installments. This silence is interpreted by the IRS as the denial of a right to pay by such a method. Consequently, Service personnel are directed to request immediate satisfaction of the tax debt. If the taxpayer cannot comply, he is requested to fill out a financial statement. If there are no assets to seize, the Service has no choice but to accept installment payments.

Service reluctance about installment payment agreements is puzzling in view of the fact that so few taxpayers would be eligible for its use. As far as lost revenues are concerned, it would seem that the government is compensated by the collection of penalties and interest on other overdue accounts, particularly in view of the recently approved rates tied to the prime interest rate. With this in mind the IRS should be encouraged to liberalize installment payment procedures, at least to the extent that they involve smaller liabilities.

In 1973, collection efforts were suspended on 313,884 delinquent accounts — representing $397,459,356 — which were reported uncollectible. During the same year, the Service's field offices received nearly 3 million new delinquent accounts representing over $5 billion. Hence, the

Service appears to write off accounts on a grand scale, but the influx of new accounts requires that some limit be placed on efforts to collect old ones.

At some point the cost of collection exceeds the amount to be collected, particularly on small-delinquency accounts. Cost considerations do seem to outweigh any undesirable impact on voluntary compliance which might result from writing off accounts. Despite this, some accounts listed as uncollectible were reported as such merely because the tax debt could not be satisfied immediately. IRS collection personnel commonly indicate that if a balance due can be paid only in installments and the schedule of payments is too long or their size too small, the account will be written off.

The question of fairness arises in writing off delinquent accounts. Is it done too soon? After a review in 1971, the General Accounting Office had no adverse comments. Yet in another review conducted by the IRS Internal Audit Division, of 1,500 cases reported uncollectible in the same year, an error rate of 6.6 percent was found.

Although the majority of accounts marked "uncollectible" are eventually collected, the inventory of such accounts at the end of 1973 stood at $1.3 billion of the $3.1 billion in total outstanding delinquent accounts. The magnitude of the total should impel the Service to consider giving field personnel more guidance in writing off such accounts. It seems plausible that concrete guidelines will reduce the incidence of poor judgment and inconsistency in treatment of taxpayers which was found by the Service's Internal Audit Division.

It is recommended that the Internal Revenue Service should keep collection personnel advised of the minimum acceptable installment payment in order that the costs of processing such payments will not exceed their sum. No payment agreement should be rejected solely because of the length of time it would require to satisfy the debt; however, waiver or extension of the statute of limitations for collection should be obtained if the time needed for payment will extend beyond the limitations period, and the agreement should be subject to at least annual review and adjustment to reflect changes, if any, in the taxpayer's ability to liquidate the unpaid delinquency. Finally, the Service should discontinue any reference to agreements for payment of delinquent taxes in periodic installments as "part payment" agreements, because such terminology fosters the mistaken impression that a portion of the tax debt has been forgiven. The idiom of "part payment agreement" should be supplanted with such terms as "installment agreement," "periodic payments," or others which do not connote that less than the total delinquency is to be paid.

Employer Tax Delinquents

The timely collection from employers of taxes which have been withheld from employees either as Social Security deductions or as employee income taxes is of vital importance to the daily operation of the Federal Government. Such collections and their subsequent transfer to designated Federal depositories enable the government to have access to a continuous supply of funds without the need to borrow to meet its obligations. Employer tax withholdings constitute the primary means of revenue collection. Additionally, they help assure that wage earners do not become tax delinquents through inability to meet year-end income tax obligations.

As trustees of taxes withheld for the benefit of the Federal Government, employers have a critical duty to meet their tax reporting and payment responsibilities on schedule. If an employer fails to meet these responsibilities, the government is still bound to credit the employees' accounts with the amounts withheld and to determine their current income tax liabilities (and their future Social Security payouts) on the basis of these amounts (and employer and employee Social Security contributions) whether these sums are paid or not.

Federal Tax Deposits (FTDs) consisting of the funds withheld from employees are required to be paid over to designated depository banks within three banking days after they have been withheld. Employer reports of tax withholdings are required on a quarterly basis. Earlier requirements specified that the funds were to be turned over within 14 days. Because any delay in the collection of FTDs increases the government's need to borrow funds, shortening the period has meant substantial savings to the government in borrowing costs. Wage withholding results in the collection of about $150 billion a year. Because of the immensity of this figure, a 10-day reduction in FTD-collection time saves the government as much as $250 million a year in interest costs.

The requirement that withheld taxes not be paid directly by employers to the Service, however, has separated the accounting for receipt of the funds from the Service's processing of the employer quarterly reports. This separation has created problems for the Service, particularly in efforts to detect delinquents quickly. The normal time between payment and posting to the employer's Business Master File at the Service Center is six to eight weeks, but that period may be stretched to 16 weeks by data-processing difficulties. The employer's reporting device, Form 941, is processed on an expedited basis by the Service, and such processing is often completed before the Federal Tax Deposits are processed by the Federal Reserve Bank, which collects the funds from the designated commercial banks and reports to the National Computer Center (NCC). As a consequence some employers claim Federal Tax Deposit credits on their quarterly returns which have not been reported to the NCC until well after the return is filed.

Because of the importance assigned to employer tax withholdings by the IRS, any apparent deficiency is swiftly dealt with. A Taxpayer Deficiency Account (TDA), is issued immediately to permit speedy contact with the delinquent employer. However, a 1974 IRS Collection Division study showed that of all employer TDA's issued in 1973, 28 percent involved withheld taxes which already had been paid.

Quick identification of employer delinquents is vital. In times of high interest rates and a stagnant economy, money owed the government can constitute a source of ready and cheap capital to unscrupulous or financially troubled employers. Until July, 1975, the interest on withholding tax deficiencies was only 6 percent per year. There is a one-time penalty for underpayment of withheld taxes in the amount of 5 percent of the deficiency, and a monthly penalty of 0.5 percent of the unpaid balance limited to a maximum of 25 percent. Starting July 1, 1975, the interest rate on deficiencies was raised to 9 percent, which may curtail, at least for the time being, the tendency of businesses hard-pressed for cash to borrow withheld taxes from the government.

The cheaper cost of "borrowing" from the government resulted in 1973 in 2.3 million "balance due" returns filed by employers. Another 180,000 returns contained errors in arithmetic or preparation which, when corrected, resulted in a balance due to the government. In all, 15 percent of 1973 quarterly returns were not fully paid. While many of these balances were quickly satisfied in response to demands for payment, the Service assigned more than 1.5 million TDA's to local offices for collection of $2.5 billion in overdue withheld taxes. Although there are no accurate statistics available, the consensus is that at least 50 percent of the employers on whom TDA's are issued have been delinquent in the past.

In order to facilitate prompt identification and collection of delinquencies by employers in making their payments of withheld employee income taxes and of Social Security taxes, it is recommended that commercial banks be required to forward records of such payments directly to IRS Service Centers.

The Service has not had as high a success rate in dealing with delinquent employers as it has with individuals in protecting Federal revenues. Part of this failure stems from the reluctance of Revenue Officers to seize assets of a going-business to enforce the government claim. It further appears that the larger the business and the longer it has been established, the less likely it is that the Service will move forcibly. The Service's relatively lighthanded treatment of business delinquents may reflect undue concern about the repercussions that firmer treatment might arouse among their employees and in their communities.

Business taxpayers should be treated even-handedly and firmly where collection of delinquent taxes is involved, except perhaps when it is clear that hasty, forcible collection would result in very serious, long-term damage to the local economy. The Internal Revenue Service does not have authority to decide to go easy on businesses that do not pay taxes in a timely fashion.

Compounding the difficulty of tax collection efforts from delinquent business taxpayers is the reluctance of the judiciary and U.S. Attorneys to deal with business tax enforcement cases generated by the Service. Judicial reluctance is manifested in the light penalties imposed on business officers. This galls the Service because whether they are paid over or not, withheld taxes must be credited to employee accounts. U.S. Attorneys prefer not to handle the cases at all.

New businesses are the most likely to be delinquent in paying over withholding deductions to the government. Yet efforts by the Service to prevent delinquencies among fledgling business enterprises seem only marginal. Despite its recognition that new businesses are the most apt to need guidance, the Service currently merely "invites" their officers to write for a readily available Business Tax Kit, which will be delivered on request. While the Service does have authority to apply a 100 percent penalty on the responsible officers of all delinquent business taxpayers, it is questionable what deterrent effect the penalty can have when in most cases the officers are not advised of its existence until it is applied. Clearly, the Service could do much more.

Consequently, *it is recommended* that the Internal Revenue Service should endeavor, in connection with the assignment of employer identification numbers, to give officers of new businesses written advice of their possible personal liability for payment of withheld employee taxes. The advice given should invite discussion of any questions with a Taxpayer Service Representative. When officers do respond and it is determined that there is a responsibility to pay and file returns of certain taxes, a follow-up contact should be made to ascertain that the responsibilities are understood and followed. Moreover, the Service should work with other Federal agencies to assure that the officers of new employer organizations being established with Federal financial assistance will become familiar with their responsibilities before they commence operations. Similar efforts, with the cooperation of parent organizations, should be made to contact and instruct franchisees and licensees of chain stores, food outlets, oil companies, and the like.

CHAPTER 3 — CIVIL PENALTIES

The Internal Revenue Code contains a complex and in some ways overlapping assortment of civil penalties that the Internal Revenue Service can impose on the taxpayer. Such penalties call for money payments in addition to the tax, as a consequence of culpable conduct, and are regarded as necessary for assuring compliance with the tax laws. The existence of such penalties, routinely utilized and substantial in relation to the amount of tax, is thought to deter intentional violations and to discourage negligence.

There is, though, a lack of information to support the generally held rationale that the civil penalties are an effective method for achieving compliance with the tax laws. The Internal Revenue Service does not possess figures on how many penalties are assessed, the size of the penalties in relation to taxes due, how often the penalties are litigated, or how often penalties are disposed of in the settlement process. Such information obviously is of importance in determining the deterrent value of the penalty system and how effectively and fairly it is working. *It is recommended* that the Internal Revenue Service publish an annual study on the assessment and collection of civil penalties.

There are at least 64 different civil penalties provided for in the Internal Revenue Code. They range from the well-known penalties for filing late tax returns and for fraud or negligence to such exactions as the $50 penalty (recently repealed) for knowingly purchasing any filled cheese which has not been branded or stamped according to law. All the penalties provide for payment of specifically defined sums of money — either absolute sums or percentages of the tax or deficiency. This report focuses on the penalties for filing incorrect or late returns and for late payment of taxes.

Most of the assessed penalties grow out of IRS audits of tax returns. (The audits and settlements procedure, and its application to civil penalties, is described in Chapter 1.) The penalty system gives a compliance force to the audit process that otherwise would be lacking. Without the penalties, a taxpayer who intentionally files an erroneous return might more readily gamble that, even if audited, he would be required to pay only the tax plus interest.

Penalties for Underpayment of Taxes

There is a serious question, however, whether the present system of penalties for underpayment of tax is so structured and administered that it properly fulfills its punitive and deterrent roles. A basic shortcoming in the present system is a lack of gradations in the penalties, with the result that the punishment does not always fit the offense. Too often, for example, conduct amounting to or approaching fraud is penalized as mere negligence. *It is recommended*, therefore, that a more flexible range of penalties be established, to cover intentional violations that may fall short of fraud.

The most serious penalty is for fraud. It is also the most ill-defined and most unevenly applied penalty. The Internal Revenue Code (section 6653 (b)) provides a penalty equal to 50 percent of an underpayment that is due to fraud, but does not define civil fraud. The Internal Revenue Service, in its Internal Revenue Manual, defines civil fraud as requiring only a knowingly false and material representation of fact with the intention that the representation be accepted as truthful. Under this definition, a taxpayer who knowingly pads his charitable contributions by even $5 has committed fraud.

In practice, however, the IRS follows a much narrower definition of civil fraud. In large measure, the Service has been constrained by a line of court opinions holding that civil fraud should be limited to egregious cases of highly culpable conduct, reflecting a pattern of evasion. In civil fraud cases, the Service must carry the burden of proof and must prove fraud by clear and convincing evidence.

As a result, civil fraud has come to mean something different from mere intentional inaccuracy in a tax return. Rather, it has come to be nearly equated with criminal tax evasion, which involves an aggravated willful attempt to evade taxes and carries with it a penalty of imprisonment or fine. But there are administrative distinctions between criminal and civil fraud cases. When fraud is suspected in auditing, the case is immediately referred to the Intelligence Division, the criminal investigative arm of the Service. If criminal prosecution is decided against, the case is returned to the Audit Division, which is still free to determine that there was civil fraud. Within the Service, however, there appears to be a reluctance to press civil fraud. An internal review by the Service last year showed considerable variation in the use of the civil fraud penalty from district to district. The review focussed on cases that were referred back by the Intelligence Division. In the Wilmington District, examining agents assessed civil fraud penalties in 77 percent of the cases, and in the Cincinnati district it was 55 percent. But the figure was only 36 percent in New Orleans, 20 percent in Philadelphia and six percent in Dallas.

Several reasons appear for this uneven use of the civil fraud penalty. Examining agents are under pressure to complete a large volume of agreed cases, and assertion of fraud tends to delay completion of a case. The belief has grown among agents that cases not involving larger dollar amounts will not be pressed by management, and management in turn has come to the conclusion that the courts will limit penalties to situations involving highly flagrant behavior. Consequently, in many districts, the civil fraud penalty is reserved for cases in which criminal fraud is likely to be present.

As a result, there are a multitude of cases involving behavior which would seem to amount to civil fraud but which are not treated as fraud. Such cases tend to be handled as matters of negligence, under the provision for a five percent penalty.

The negligence penalty originally was intended to apply to underpayment of taxes "due to negligence or intentional disregard of rules and regulations (but without intention to defraud)." The Internal Revenue Service defines negligence as an "omission" which "a reasonable and prudent man would not do." In practice, however, the tax negligence provision has been applied to conduct far different from the traditional concept of negligence in tort law. Today the negligence provision is routinely applied to an intentional underpayment of taxes, although, literally, no negligence has occurred. Consequently, in application of the tax laws, the word "negligence" has come to have two distinct meanings: a failure to utilize proper care, and a lesser degree of intentional conduct than is required in practice to sustain a fraud penalty. (Inadvertent mathematical errors are not usually deemed to constitute negligence.)

Consequently, a surprisingly broad range of misconduct is covered by the negligence penalty. Flagrant fraud is often treated with the same level of penalty as is mere inadvertence. Such unequal results are probably not what Congress intended. But judicial and administrative constructions that have broadened the definition of negligence and narrowed the definition of fraud reflect a defect in the tax statutes as they presently are enforced. There is no penalty between the mild five percent penalty for negligence and the 50 percent penalty reserved for highly culpable conduct. However, an immense middle ground exists. There is an endless array of cases which involve reckless or intentional overstatement of deductions or understatements of income where the inaccuracy fails to reach the level of quasi-criminality now required to establish fraud. In effect, there is a vast "excluded middle" in the penalty system.

There are a number of different approaches that might be followed to fill the present gap in the penalty system. One approach would be to raise the negligence penalty to some substantial level, such as 25 percent. Presumably, this higher penalty would provide a substantial deterrent to tax cheating, but would seem excessive for simple negligence where the taxpayer has failed to take reasonable care in keeping records or preparing his return. To raise the level of the negligence penalty to deal with the problem of intentional misconduct would be to reverse the situation in an inequitable fashion. Instead of the cheaters being lumped with the negligent in the present scale of penalties, the negligent would find themselves penalized as cheaters.

Another possibility would be to create a new sliding scale of penalties. Thus, there might be a discretionary penalty ranging from five percent for simple negligence to 25 percent or more for intentional inaccuracies, with the levels in between used for grossly negligent or recklessly prepared returns, keeping the 50 percent penalty for highly culpable tax evasion. Such an approach, however, would confer considerable and presumably unacceptable discretionary power on the IRS to determine the level of punishment, which as applied would yield widely varying results in individual cases. Abuses of such discretionary power would be inevitable and difficult to police.

A third approach, and one *that is recommended*, is creation of a new intermediate penalty of, say, 25 percent. This penalty would apply to conduct more culpable than negligence but less culpable than quasi-criminal fraud or willful evasion. This approach would have the advantage of preserving the small but useful five percent penalty for negligence and the heavy 50 percent for aggravated tax evasion. The new intermediate penalty would be sufficiently severe that a taxpayer would have to weigh it in making any plans to cheat, and, consequently, should enhance the deterrent role of the penalty system. At the same time, a fixed intermediate penalty avoids the problem of granting excessive discretionary authority to the IRS and the courts.

To provide a clear trigger for the proposed new penalty, it would be necessary to redefine and restructure the civil penalties provision (Section 6653) in the Internal Revenue Code. The five percent penalty would be retained for negligence, which would be defined as failure to exercise reasonable care in keeping records or in preparing a tax return. The present five percent penalty for "intentional disregard of rules and regulations (but without intent to defraud)" should be repealed. The 50 percent penalty for civil fraud would be redefined to cover "willful tax evasion," and the confusing term "fraud" would be eliminated. The new intermediate penalty would apply to intentional or reckless inaccuracies where the conduct does not amount to willful tax evasion. Intentional underpayments would be those the taxpayer knew or was substantially certain would occur; reckless underpayment would occur when the taxpayer consciously disregarded a substantial risk of underpayment.

One effect of such a redefinition would be to make clear that the present 50 percent penalty for civil fraud is designed to reach the same kind of conduct (except often less extreme) covered in the criminal laws on tax evasion. This should help clarify the present confusion between civil and criminal fraud and help overcome the reluctance of the IRS to pursue civil fraud charges. The new in-between penalty would clearly cover conduct not serious enough to constitute willful tax evasion under the present civil fraud penalties but more egregious than ordinary carelessness. It would cover both intentionally inaccurate returns and those where the taxpayer proceeded despite his lack of knowledge that the figures on his return were incorrect.

In asserting the new penalty, it would be important to impose the burden of proof on the taxpayer to demonstrate that his conduct was not reckless or intentional. Procedurally, this would help draw a necessary distinction between civil fraud and intentional inaccuracies to be handled under the proposed intermediate penalty. In civil fraud, the burden of proof is placed on the government, reflecting the quasi-criminal nature of the charge. Under court rulings, the government has the additional burden of demonstrating bad faith or intentional wrong-doing, which means establishing the taxpayer's state of mind in preparing a return. Indeed, many rather obvious cases of intentional cheating fail to be treated as fraud under present law because of the onerous burden placed on the IRS of establishing the taxpayer's state of mind. Under the lesser intermediate penalty, the same burden of proof should not be imposed on the government. In effect, the government is waiving charges of civil fraud, which intentional inaccuracies might have amounted to in many cases. In return, the taxpayer should assume the burden of demonstrating that his conduct was not reckless or intentional. There would be a difference, however, in the standards of proof. In civil fraud, the government must prove its case in a clear and convincing fashion. With the proposed intermediate penalty, the taxpayer should only have to prove his case by a preponderance of the evidence. This, however, should not preclude the imposition of a negligence penalty in event the taxpayer should demonstrate that he was not guilty of reckless or intentional misconduct.

Assessment of Penalties for Different Degrees of Culpability

Under present law, the IRS, in assessing fraud penalties, does not distinguish between deficiencies caused by fraud or intentional errors and those caused by negligence or honest mistakes. The practice is to impose the 50 percent penalty for fraud on the entire deficiency even though only part of the deficiency is attributable to fraud.

The result quite frequently is a disproportionate and unfair penalty. For example, a taxpayer may have fraudulently evaded $5,000 in taxes. At the same time he may have another deficiency of $80,000 for claiming excessive depreciation, which occurred because of a good-faith but erroneous use of the wrong method of depreciation, and thus, at most, should be subject to the five percent penalty for negligence. Under present practice, the taxpayer would be required to pay a civil fraud penalty of $42,500 — or 50 percent of the total deficiency of $35,000 — even though only $5,000 of the deficiency was clearly attributable to fraud.

Obviously, this present method of computing penalties also discourages agents from asserting the fraud penalty where the total deficiency is very large but only a small part is attributable to fraud. Thus, the present computation method is contributing to the underutilization of the civil fraud penalty.

It would not be an administrative burden on the IRS to differentiate between the items making up a deficiency. It would seem a modest burden for the IRS to distinguish between the deficiencies caused by willful tax evasion, less flagrant intentional inaccuracies, negligent inaccuracies, non-negligent errors and bona fide disputes of law, just as each distinct item in a deficiency now has to be separately stated and supported in a deficiency notice.

It is therefore recommended that, in imposing any of the penalties for underpayment of tax, each penalty rate should be applied only to that portion of the underpayment as is attributable to conduct that is liable for such rate. The highest marginal tax rate should be applied to that portion of the deficiency attributable to conduct liable for the highest penalty rate, as illustrated in Appendix A to this summary.

Publicity of Civil Fraud Penalties

By law and by practice, a distinction is drawn between the publicity given criminal tax convictions and penalties imposed for civil fraud. The IRS publicizes criminal tax convictions, both those arising from guilty pleas as well as those from guilty verdicts. Such publicity obviously is viewed by the IRS as essential if criminal tax law enforcement is to have a deterrent impact upon the taxpaying public.

But the IRS does not publicize the imposition of the 50 percent civil penalty for fraud. If the taxpayer litigates the penalty, his name will appear in a court-reported case, but generally the press and the public would take no notice. If the taxpayer settles his case administratively, there is no publicity at all. One reason given for this secrecy is the bar to disclosure of individual tax return information. It is also argued that there is a difference between criminal tax cases, in which the convicted taxpayer has lost the right to privacy about his tax return, and civil fraud cases. The difference, however, does not seem persuasive in protecting the privacy of the person guilty of civil fraud. Most civil fraud cases are quasi-criminal in nature, characterized by highly blameworthy conduct, much worse than garden-variety tax chiseling. It can be argued that taxpayers who engage in such fraud have forfeited their right to privacy of tax data; that publicity for the penalty would increase its deterrent effect; and moreover, that publicity in itself would be a severe sanction, to many persons worse than any money penalty.

It is recommended, therefore, that the Internal Revenue Service should seek legislative instruction with respect to publicizing the imposition of the 50 percent penalty for fraudulent underpayment of tax (or, as recommended in 3–I above, restated as "willful attempt to evade payment of tax").

Penalties for Delinquencies in Filing Returns and Paying Taxes

The Internal Revenue Code (Section 6651) provides a penalty for failure to file a tax return on time. The penalty is five percent of the amount of the tax in the first month and an additional five percent for each succeeding month, up to a total penalty not exceeding 25 percent of the tax. However, the penalty is not imposed if the taxpayer establishes that his late filing "is due to reasonable cause and not due to willful neglect."

Failure to file is unquestionably a serious infraction, warranting a heavy penalty. There is a question, however, whether the penalty for non-filing does not escalate too quickly and terminate too soon. The five percent penalty for the first month obviously provides an incentive for the taxpayer to get his return in on time. But after the first month, the penalty escalates at an effective annual rate, 60 percent on the entire tax, that would generally be viewed as very steep, particularly so when the penalty for failure to pay a tax shown on a return is at the rate of only ½ of one percent per month or six percent annually. Moreover, the rapid escalation of the penalty seems to create an undesired side effect of encouraging procrastination on the part of the taxpayer after five months. When the maximum penalty has been reached after five months, the penalty creates no additional pressure to file.

It is recommended, therefore, that the penalty be stretched out over a longer period of time, and that after the first month the rate at which the penalty accrues be reduced. The penalty would become less onerous for relatively short-term delinquencies and provide an incentive over a longer period of time for a taxpayer to file his return.

Especially if this change not be made, *it is recommended* that the penalty be prorated after the first month to reflect the half of the month in which a return is finally filed. Under present law, a taxpayer is charged a full month's penalty for a delinquency of only one day of a month. It seems difficult to justify a system which treats a delinquency of one day the same as a delinquency of an entire month. The law as it stands encourages procrastination on the part of the taxpayer.

Administrative and Judicial Review of Late-Filing and Failure-to-Pay Penalties

The taxpayer who is assessed a penalty for late filing (or for failure to pay the full tax with his return) finds himself with little administrative or judicial recourse to overturn what may be an arbitrary decision on the part of the IRS. Such penalties are generated by computers at regional IRS Service Centers.

In principle, the penalty can be abated if the taxpayer can demonstrate that his delinquency is "due to reasonable cause and not due to willful neglect." But the practical opportunities for making such a demonstration are limited. Under IRS procedures, the delinquent taxpayer is supposed to submit a written explanation of his tardiness or failure to pay with his return. If no explanation accompanies the return, or if the processing section at the Service Center fails to accept the written explanation, a computer will send the taxpayer a bill for the penalty. The computer notice contains the telephone number of a local IRS office with which the taxpayer can communicate regarding the bill. The IRS employee at that number has access through a computer terminal to information about the taxpayer's account. If satisfied with the taxpayer's explanation, the employee can revoke or decrease the penalty. Alternatively, the taxpayer can write to the Service Center, where tax examiners consider his explanation and have authority to abate the penalty.

If the taxpayer fails to respond to the computer notice sent by the Service Center, three more letters are sent him, demanding payment of the penalty in increasingly urgent and threatening terms. Finally, the case is declared a Tax Delinquency Account and referred to collection personnel in the taxpayer's district. Employees in the Collection Division generally will contact the taxpayer and give him a final chance to explain the delinquency. If the explanation is not accepted by the responsible revenue officer, or his group manager, the drastic collection process begins against the taxpayer. (For details of the collection process, see Chapter 2.)

Failure-to-file cases may readily present disputable issues of law and fact. Late filing is excused if the taxpayer establishes that his delinquency was "due to reasonable cause and not due to willful neglect." The test is whether the taxpayer exercised ordinary business care and prudence. Needless to say, this sort of test does not lead to clear-cut and indisputable results in many cases, especially where illnesses, or the errors of tax advisers, are involved.

No doubt many of the explanations submitted by taxpayers are accepted by IRS officials. But if an explanation is rejected, the options open to the taxpayer are markedly different and more limited than those available to a taxpayer who has undergone audit. The audit procedures are available for inaccuracy penalties, but not failure-to-file or late payment penalties. If a deficiency is claimed after an audit, an elaborate negotiating procedure is open to the taxpayer before he has to pay the tax (and/or penalty). He can negotiate with the revenue agent's group chief, a district conferee and finally with the appellate division. If the matter is not resolved through negotiations within the IRS, he can file a petition with the Tax Court. Before the case has been heard by the court, he can negotiate further with the regional counsel. Only after the case has been decided against him by the court must he pay the tax and any accompanying penalties.

In contrast, the administrative relief available to a taxpayer before paying a delinquency penalty is very sparse. The taxpayer may send a letter to a tax examiner at the Service Center or speak over the telephone toll-free with an IRS employee. After his account has been declared a Tax Delinquency Account, he can try to convince the collection officers to whom the case has been assigned. But in order to negotiate further with the IRS, he must pay the penalty and file a claim for refund. If his claim is denied, he can litigate only in a Federal district court or the Court of Claims. The Tax Court, with its more informal and less expensive procedures, is not open to him.

In view of the muddiness of many reasonable cause determinations, the administrative and judicial review available to delinquent taxpayers seems most inadequate. It is doubted that a taxpayer (especially an uneducated one) should be expected to present his case in the form of a detailed written statement that will satisfy a harassed tax examiner in the Service Center. If he writes only that he was sick or that his accountant made a mistake, that will probably not be enough. But perhaps he does not know to write more. His alternative opportunity of making telephone contact with a local office may be helpful, though IRS telephone numbers are often busy, and it may prove difficult to explain over the telephone precisely what the excuse was. The employee may seem distant and not take the trouble to ask for additional, necessary details. Yet, if the taxpayer had the opportunity for a face-to-face negotiating session with trained IRS personnel, as under the audit procedure used for inaccuracy penalties, the excuse might be accepted. In order to provide more certainty and awareness for taxpayers of the reasons the Service accepts as excusing lateness in filing a return, *it is recommended* that a listing of such reasons should be officially set forth in the Service's regulations.

Recourse to the Federal district courts or the Court of Claims, after paying the penalties, is not adequate for many taxpayers, particularly those with lower incomes. Apart from the hardship of having to pay the penalty before going to court, the formidable procedural problems of dealing with Federal courts would require virtually every taxpayer to hire an attorney, which would hardly be practicable for cases involving less than some thousands of dollars in penalties. If access to the Tax Court were allowed, the taxpayer could litigate before paying, which may be of critical importance to his financial survival. He also would have the benefit of the relatively simple procedures of the Tax Court, especially those for the small tax case. He could represent himself or have his accountant represent him.

Accordingly, *it is recommended* that the appellate audit and settlement processes of the IRS, and the procedures of the Tax Court, be opened up to taxpayers disputing penalties for late filing or failure to pay with a tax return. Opinions vary as to whether this would place an undue administrative burden on the IRS, or would swamp the Tax Court, diverting it from consideration of more worthy tax disputes. But nobody really knows if that would be the effect. The IRS has no available statistics on how many delinquency penalties are assessed and how many are disputed after being processed by the IRS. In light of the patent inadequacy of the present recourses open to the taxpayer charged with delinquency penalties, it seems clear that more useful avenues of appeal should be opened to him.

APPENDIX A

If the penalties are computed as suggested in the text, the highest-level penalty will always attach to that segment of the income which is infected by the conduct to be penalized, and which is subject to the greatest tax rate which may be attributed to such segment. For example:

	Reported	Actual
Adjusted Gross Income	$47,000	$72,500
Itemized deductions		
Allowable medical expenses	300	—0—
Charitable	1,000	—0—
Other	2,500	2,500
Taxable income	$43,700	$70,000

Assume the following:

(a) $8,000 of underreported income is due to willful tax evasion.

(b) $7,000 of underreported income is due to an intentional inaccuracy which does not rise to willful tax evasion.

(c) The $1,000 charitable deduction was improperly claimed through negligence.

(d) $10,000 of underreported income is due to no fault of the taxpayer for which a penalty would be imposed.

Income	Tax	Tax Difference	Penalty
$70,000	$32,790		
8,000 attributable to tax evasion			
		$5,220 × 50%	$2,610
$62,000	$27,570		
7,000 attributable to intentional inaccuracy			
		$4,280 × 25%	$1,070
$55,000	$23,290		
1,000 attributable to negligence			
		$ 620 × 5%	$ 31
$54,000	$22,670		
10,300 without fault			
		$6,425 × 0	0
$43,700	$16,245		

(a) The tax evasion penalty would attach to the $5,220 difference in tax between the $70,000 and the $62,000 levels, as this difference was due to an $8,000 underreporting due to tax evasion.

(b) The intentional inaccuracy penalty would attach to the $4,280 difference in tax between the $62,000 and the $55,000 levels, as this difference was due to underreporting by reason of an intentional inaccuracy not rising to tax evasion.

(c) The negligence penalty would attach $1,000 difference in tax between the $55,000 and the $54,000 levels, as this difference is due to negligence.

(d) There would be no penalty on the $6,425 balance of the tax due, as it arose from faultless underreporting. This portion of the underreporting also resulted in eliminating the medical deduction, and there should be no penalty for the loss of it. However, had the medical deduction been larger, its elimination due to increased gross income could be attributed to the increased income and any tax liability resulting therefrom should bear the same penalty as the tax on the increase in gross income which eliminated or reduced the medical deduction.

CHAPTER 4 — THE IRS SUMMONS POWER

Among the broad powers given to the IRS to verify the accuracy of taxpayer returns and to collect taxes is its administrative authority to summon any taxpayer, his employer, accountant, banker or any other third party,* to supply relevant books and records and to require that such persons testify under oath.

The power of summons is vested by the IRS in Internal Revenue Agents, Revenue Officers and Special Agents, who are instructed not to use it wantonly or lightly. These IRS officials additionally are cautioned that summonses are to be used as a last resort to obtain information not otherwise available. A summons may be served by any authorized member of the IRS by delivering it into the hands of the summoned person or his authorized representative, or by leaving it at the individual's last known residence. It must permit at least 10 days before the taxpayer's or third party's appearance to permit time to gather the requested material or to prepare objections to the summons.

For all the apparent strengths of the IRS summons power, however, legal constraints are imposed, as there are on the enforcement of all administrative subpoenas. Partly because they are not clearly defined by the IRS, these constraints are likely to be unknown by the average taxpayer, who is apt to believe that his legal obligation to turn over the requested information is immediate and unconditional, and he is likely to assume that any failure to comply with an IRS summons can lead to substantial civil and criminal penalties and perhaps to harassing audits. This is not the case. Where the taxpayer asserts in good faith objections to the summons, he need not comply with the summons until such objections have been ruled on administratively and by a Federal court. Not infrequently a taxpayer may have legitimate reasons for not complying with a summons but is unaware of his right to object. As a consequence, he may comply and turn over information which he could rightfully withhold if properly advised.

For the average taxpayer a summons is a frightening, even intimidating, document inducing compliance. The tax code itself is perplexing on whether the taxpayer is obligated to comply. In one section (7210), it provides for fines and imprisonment for failure to obey a summons; but in another section (7604) it specifies that a summons can be enforced only by a Federal District Court.

As spelled out in a line of court decisions, however, the only immediate obligation of a taxpayer confronted with a summons is to appear before an IRS official to enter his objections to the summons. In the event that the official rejects the challenge to the summons, and the taxpayer or his representative or a third party refuses to produce documents or to testify, the IRS must decide whether to pursue enforcement. If the Service decides to seek enforcement, the case is taken to a Federal District Court which holds a hearing and makes a judicial determination as to whether the summons is valid. If the court orders compliance, a taxpayer's failure to obey a summons may subject him to contempt of court proceedings as well as to the civil or criminal penalties for contempt contained in the tax code.

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*The word "taxpayer," as used by itself in this chapter, should be understood to include any third party, unless the context makes it clear that only the taxpayer is being referred to.

Generally speaking, an IRS summons will not be enforced by the courts if it is vague, ambiguous or deficient; if the individual can establish that he cannot comply with its demands; if the purpose for which it is being used is improper; or if it was issued to harass a taxpayer or force him to settle a dispute. In the latter instance, the burden of proof is on the taxpayer, and courts have been reluctant to find a pattern of harassment and bad faith.

One of the controversial issues regarding the IRS' summons power is its use for criminal investigations. Taxpayers have persistently and strenuously objected to the use of summonses to obtain evidence of criminal tax fraud or evasion. Such use of administrative summonses for criminal investigatory purposes raises obvious problems of potential conflict with the Constitutional protection against self-incrimination.

Without question, the IRS uses its administrative summons power in connection with criminal tax fraud investigations. This is clear from the fact that Special Agents of the Service's Intelligence Division, whose chief function is to investigate criminal violations of the tax laws, are a major source of the summonses.

The courts have not squarely faced up to the question whether a summons may properly be issued to obtain evidence of a criminal tax law violation. In part, this is because the IRS persistently maintains that in addition to the criminal aspects of any case, the issuance of a summons always may lead to evidence of civil violations of the tax laws and facilitate proof and enforcement of tax liability.

In 1971, the Supreme Court, in *Donaldson* v. *U.S.*, approved the Service's use of an administrative summons to obtain evidence in a tax investigation from a taxpayer who was also under investigation for criminal violations of the tax code. The court decision established a two-pronged test, namely, that the summons must be issued prior to an IRS recommendation for criminal prosecution and that the summons be issued in "good faith," meaning for some proper purpose other than obtaining evidence of criminal violation. To establish lack of good faith, it is incumbent upon the individual to demonstrate that the summons was issued solely for criminal investigatory purposes.

The IRS' position is that any information "voluntarily" obtained through use of an administrative summons may be used against the individual even though it is incriminatory. True voluntary compliance, however, must be based on an adequate understanding of the IRS' summons power. If a person complies with a summons because he believes that failure to do so will result in the application of sanctions then his compliance would seem to be compelled by his fear based upon his lack of knowledge.

The use of a summons for criminal investigation thus reinforces the general observation that the IRS has a responsibility to advise those to whom a summons is issued of their rights to contest the request for information. Accordingly, *it is recommended* that the IRS revise its summons form to state expressly the administrative procedures available to the taxpayer for entering objections to supplying the information or testifying, and to indicate more accurately the circumstances in which failure to comply with the summons may subject the taxpayer to punishment.

Some taxpayers have objected that summonses were being used by the IRS for "fishing expeditions" through their records. The IRS acknowledges that there is an element of "fishing" but contends that it is legitimate. In its Handbook for Special Agents, the IRS states that:

> The purpose of a summons is not limited to obtaining records of what the Government already knows, therefore the Government is entitled to indulge in some "fishing."

The limitation established in the Handbook is that "a reasonable basis" must exist for the summons and tax investigators cannot engage in "arbitrary inquiry" or an "inquisition." In principle a summons may only demand production of records and testimony relevant or material in establishing the correctness of a tax return. The courts generally have held that the information sought in a summons was relevant and material, thus giving the IRS some latitude for "fishing."

Third-Party Summonses

The Internal Revenue Service uses its administrative summons power to demand records from banks, employers, accountants and others who have dealings with a taxpayer under investigation. In such cases, the IRS apparently feels under no obligation to notify the taxpayer — the person most directly involved — that a summons has been served on third parties. This raises a serious question whether the IRS has not assumed unduly sweeping authority to conduct fishing expeditions in search of information it can use against a taxpayer.

The third party, of course, does have the right to challenge a summons. And it appears that the courts generally require the IRS to make a greater showing of specificity, need, and relevance of the information in serving summonses on third parties. On occasion, third parties have successfully challenged summonses on the grounds that compliance would be unduly burdensome, that the requested material was not relevant or material to the inquiry, or that the description of the requested material was indefinite. However, the tendency of the courts is to modify, rather than to refuse to enforce, such summonses. Furthermore, many third parties, perhaps because they regard their own relations with the IRS as more important than their relations with a taxpayer under investigation, readily comply with the summonses.

It can be argued that in order to protect the rights of the taxpayer in case of third-party summonses, he should be given notice that a summons has been served on a third party so that he would be in a position to go to court to contest the summons or apply for restraints in compliance with the summons. An opposing argument is that investigations would be unduly hampered if the taxpayer were to receive notice of a summons to a third party. The latter argument unconvincingly puts alleged investigative needs of the IRS ahead of the rights of the individual taxpayer. The only way that the taxpayer's rights to contest or seek modification of a third-party summons can be assured is for him to become aware that the summons has been served against a third party.

Even when informed that a third-party summons has been served, a taxpayer faces considerable difficulties in the courts in blocking the summons. In its decision in *Reisman* v. *Caplin* in 1964, the Supreme Court indicated that a taxpayer or any affected person could be heard to challenge the enforcement of a third-party summons. Subsequently, intervention by the taxpayer was often liberally granted by the courts. In 1971 in the *Donaldson* case, however, the Supreme Court restricted the situations in which courts may permit intervention or restraints against third-party summons. The court held that a taxpayer has no absolute right to intervene or to prevent third-party compliance. Rather, the taxpayer must demonstrate that he has a "significantly protectable interest" in the records being sought. The taxpayer must establish that: (1) he has a proprietary interest in the books or papers summoned; (2) the summons was issued for an improper purpose; (3) the material is protected by some form of privilege; or (4) the material is the work product of his attorney. Even then, any restraint on compliance with the summons is in the court's discretion and may not be granted.

Recent court decisions add urgency to the desirability of adjusting the balance between the convenience of the Service and the rights of taxpayers in the use of third-party summonses. The IRS is amply protected by court decisions in asserting its authority to issue third-party summonses and in obtaining compliance with them. At the very least, the taxpayer should be put in a position where he can assert whatever rights he may have to contest a third-party summons, and to seek restraint on its enforcement, by being informed that the IRS is seeking to compel disclosure of information about him from a third party. Accordingly, *it is recommended* that at the time a summons is served on a third party, requesting testimony or production of documents concerning a taxpayer, or as soon after such service as feasible — and certainly before the return date of the summons — the Internal Revenue Service should deliver a copy of the summons to the taxpayer.

"John Doe" Summonses

Usually the IRS exercises its summons power when it suspects a specific individual may have a tax liability. On occasion, however, the Service uses a "John Doe" summons demanding records or information without stating the identity of the person under tax investigation.

The use of "John Doe" summonses involves the striking of a difficult balance that all too easily can tip toward unwarranted "fishing expeditions" on the part of the Government. On the one side is the legitimate interest of the IRS in conducting an investigation in a case where it suspects a tax may be due. An example, in an action upheld by the Supreme Court in *U.S.* v. *Bisceglia,* was a case where the Federal Reserve Bank of Cleveland received $40,000 in old $100 bills from a local Kentucky bank. This was unusual and caused the IRS to suspect that the money might relate to a transaction which had not been reported for tax purposes. The IRS issued a "John Doe" summons to an officer of the bank requesting extensive books and records which would disclose the identity of the depositor.

On the other side, however, is the possibility that "John Doe" summonses will be used by the IRS to rummage through the files of a financial institution or some other organization in the hope of discovering adverse information against unsuspected individuals. Indeed, at times the IRS seems to use its summons authority under Section 7602 of the Internal Revenue Code to enforce its general authority under Section 7601 to conduct canvasses of internal revenue districts to determine whether there are persons owing taxes.

The courts have been troubled by the use of broad, open-ended summonses by the IRS. In general, the courts are likely to uphold a "John Doe" summons if the IRS is engaged in an investigation of a suspected tax liability, even though the identity of the suspect is not immediately known. On the other hand, the courts seem less likely to enforce a "John Doe" summons to support a generalized inquiry.

The Commissioner of Internal Revenue has recently directed that "John Doe" summonses may not be issued without the prior approval of the District Chief of the IRS functional activity desiring to issue such a summons and a pre-issuance legal review by the IRS Regional Counsel's Office. The purpose of these new controls was explained to be "to ensure that the IRS does not become involved in 'fishing expeditions' that are merely an invasion of taxpayer's privacy" and uses its summons authority "only in limited and justifiable circumstances." Depending on the criteria that are formulated to govern approval of the issuance of "John Doe" summonses, it can be hoped that the new control procedures will have a salutary effect on the Service's use of such summonses.

Management of the Use of Summonses

The Internal Revenue Service compiles no systematic data about the issuance of summonses by its officials and employees. It has no records of how many summonses are issued, by whom, or for what purposes. Nor has it any records of experience arising from the issuance of summonses, e.g., the extent of voluntary compliance, the frequency and reasons for challenges by taxpayers, and the extent of efforts to obtain judicial enforcement and the results thereof. Without any systematic procedures for keeping track of how the summons power is exercised and what the consequences are, it is hard to see how the management of the Service can know whether the summons power is being properly exercised. Accordingly, *it is recommended* that the Internal Revenue Service prepare and maintain statistics and analyses designed to assure better oversight of the use of the summons by its officials and employees.

CHAPTER 5 — TAXPAYER SERVICES AND COMPLAINTS

Taxpayer Services.

The bewildering complexity of the nation's tax laws creates confusion and problems for individual taxpayers. In recognition of this, the Internal Revenue Service has long assumed an obligation to assist and advise the taxpayer in meeting his tax responsibilities.

To perform this assistance function IRS has created a Taxpayer Service Division, with more than 2,000 full time permanent employees. During the peak filing season, January to April 15, this corps is supplemented by hundreds of temporary, part-time or detailed-in employees. The overall budget for providing taxpayer services is approximately $100 million annually — an enormous figure in the absolute, but not so significant when compared to the total $1.6 billion budget of the Internal Revenue Service.

Initially, all taxpayer services were provided on a first come-first served basis in local offices. Today most of the assistance is provided by telephone. Thus, in 1955, 10 million taxpayers were assisted in IRS offices, while 4.7 million were served by telephone, but in 1974, 9.5 million were served on a walk-in basis and 24.7 million by phone. Not only do these figures show the increased reliance on telephone advice, but they show the growth in numbers seeking advice as well. These services are provided on a year round basis at all district and local offices, and during the filing season in special mobile and satellite offices in an effort to reach as many taxpayers needing aid as possible. The IRS has developed assistance programs aimed at reaching particular groups, such as the Spanish speaking, senior citizens and low income persons. It has developed services such as Volunteer Income Tax Assistance, in which taxpayers are trained to aid other taxpayers. It has additionally devised educational programs for high school and adult education classes, and special training programs for tax practitioners. It makes its staff available to deliver speeches. Special programs have been adopted, expanded, and refocused from year to year to meet new and changing needs.

The principal contact within the IRS for dealing with taxpayer requests is the Taxpayer Service Representative (TSR), whose exposure and training make him the most responsive person in the Service to taxpayer problems. Because of this exposure and their basically sympathetic approach to the taxpayer, Taxpayer Service Representatives are becoming a major public relations adjunct of the Internal Revenue Service.

The TSR position has been upgraded recently by the Service, which now requires that a candidate have at least six semester hours of college level accounting and a college degree or equivalent work experience. Before June, 1975 TSR's needed only two years of education beyond high school, or two years work experience which demonstrated an aptitude for meeting and dealing with people, plus an ability to understand a body of rules and to apply them to specific cases. Upon entering the Service, TSR's are required to undergo 11 weeks of training encompassing complex issues such as investment credits, and such technical matters as Automatic Data Processing and the Integrated Data Retrieval System.

Supplementing the permanent TSR's during the filing season are other personnel, including part-time and temporary TSR's and personnel detailed from the Audit and Collection Divisions. These divisional employees for the most part are relatively new personnel, whose training has been in their designated areas.

The Service provides three basic kinds of assistance: (1) tax return assistance and preparation; (2) resolution of problems stemming from IRS notices, communications, and failures to understand either, or from the IRS' bureaucratic structure; and (3) education of individuals or groups on their tax responsibilities.

The Service has no breakdown about the respective quantities of these services it does provide or the resources applied to each. Nevertheless, it seems likely that the bulk of services supplied in direct taxpayer contact are in the return assistance and preparation category, particularly since two-thirds of all taxpayer contacts occur during the peak filing season. After April 15 at least half the inquiries involve requests for aid in IRS procedural matters, such as delayed refund checks, computer notices, and conflicts with the bureaucracy.

To offset this lack of information, *it is recommended* that the Service compile data on all manpower and funds allocated for each type of taxpayer service performed.

Taxpayer assistance in substantive tax law is designed by the IRS to be on a basis that will enable the taxpayer to prepare his own return through the ready availability of clear and comprehensive information. Taxpayer Service Representatives are present in local and district offices to provide personalized service in explaining the forms, and in a limited number of cases to prepare returns for taxpayers.

Procedural assistance covers a wide range of activities, from the routine handling of requests for extension of filing time to problems emanating from IRS' heavy reliance on computers in processing taxpayer returns. This type of assistance may be of more significance to the taxpayer than return preparation, because there is no low-priced commercially available alternative assistance for coping with procedural problems, while there is for return preparation. Yet most taxpayers polled in a recent survey expressed a desire for more IRS help in return preparation.

TSR's are the most responsive employees of the IRS to taxpayer inquiries and problems. They have the ability to explain notices, to trace payments, and to initiate freezes on further notices in confused account situations. Through their knowledge of and access to IRS' computed information, they are capable of resolving taxpayer problems rapidly. There are, however, limits on the TSR's problem solving capabilities. For example, a TSR cannot delay, stop or interfere with an audit, nor can he initiate a freeze on a tangled taxpayer account after it has been referred for collection. And he is not equipped to deal effectively with taxpayer complaints emanating from taxpayer contact with an auditor or collection agent. In most circumstances such complaints are ignored, leaving the taxpayer with little opportunity to air or redress his grievance. The Taxpayer Contact Units in Service Centers are also critical cogs in resolving taxpayers' post filing procedural problems, which largely stem from confusing computer-generated notices. This unit has the ability to unsnare complicated account problems, which TSR's in district offices are generally unable to do.

The public measures the quality of service provided by the Taxpayer Services Division in terms of aid given in the preparation of tax returns rather than in procedural matters. Based on taxpayer polls of those who had used the service, the overwhelming majority of respondents gave high marks to the quality of assistance received. The taxpayer consumers found generally that the service was clear, complete, and courteous, and they stated that they would use it again. Whether this confidence is justified or not is open to some question.

Surveys of the quality of walk-in assistance conducted by several newspapers and by the Tax Reform Research Group between 1972 and 1974 showed a significant amount of error by IRS return preparers, although in no instance was the sample tax case complicated. Particularly troublesome for the IRS assistors was computing the allowable deduction for the expense of offices maintained by taxpayers in their homes. There were procedural and mathematical errors as well. In the survey conducted by the tax reform group, two IRS personnel substantially increased the tax liability by advising the use of the standard deduction. IRS' own surveys of the quality of telephone assistance have yielded error rates of 20% or more.

Given the poor quality found in the surveys it is apparent that there is a need for more comprehensive training of TSR's. The training problem, in turn, could be more effectively attacked if the Service systematically developed more precise information regarding the needs of users of taxpayer assistance, such as relative frequency of various categories of inquiry. Compounding the problem of inadequate training is the enormous staffing crisis the Service faces during the filing season when demand for services reaches a peak. To meet the increased workload, the Service has customarily tapped employees and former employees with varying levels of skills and experience and given them a little refresher training. It has also detailed to taxpayer assistance functions employees from Collection and Audit. Collection personnel are by outlook and training ill-suited for taxpayer assistance roles. Audit personnel, on the other hand, represent a valuable asset in taxpayer services because they are among the most highly skilled and experienced personnel in the Service, although not as likely as TSR's to advise the taxpayer in areas where substantial legal conflicts arise.

Since the seasonal nature of the taxpayer assistance program inevitably requires the assignment to this function of personnel of uneven qualifications and training, the quality of taxpayer service would be upgraded significantly if there were an approved mechanism to funnel complicated questions to more experienced technicians. To achieve this desired improvement, *it is recommended* that such a referral system be established, that it be supplemented by expanded and specific personnel training geared to ascertained taxpayer needs, and that expansion of the TSR workforce during the filing season should include as many personnel from the ranks of its most experienced and knowledgeable employees as possible.

Although IRS advice, whether given in response to telephone or walk-in inquiries, frequently proves inaccurate, the IRS has consistently refused to accept responsibility for errors in returns prepared by its employees or in reliance on its advice. Consequently, if IRS advice is incorrect the taxpayer is held responsible and must pay any deficiency, penalty or interest assessed as the result of its error. We conclude that this policy is appropriate because communication between the TSR and taxpayer may not always enable the TSR to accurately obtain all pertinent facts. Establishing the facts correctly would impose such heavy burdens the tax service structure might be in danger of collapse if assurance of complete accuracy were required. Additionally, the complexity of the law is such that it is impossible for tax law experts to agree on a uniform application of law to a given set of facts. Finally, since the advice generally relates to treatment of completed transactions, the taxpayer is ordinarily not worse off having to pay a deficiency than if he had paid the correct tax in the first place.

However, the Service should adopt procedures to avoid taxpayer misunderstanding regarding the nature of the advice and the reliance which may be placed on it. Accordingly, *it is recommended* that the Service inform taxpayers that answers given are based on the TSR's comprehension of the facts; that the Service is not bound by the answers given; and that the answers are based on the Service's interpretation of the law but that there may be authority for a different approach.

Taxpayer Complaints.

About 80 million individual income tax returns are filed and processed each year. Even in the best of situations the handling of so many accounts would not be an easy task. But the tax world is not the best. Its substantive rules and its procedures are complex, and the relationship of tax collector and taxpayer is inherently an adversary one. From such a relationship, so fraught with possibilities for misunderstanding and abrasive contact, some conflicts must be expected.

Some of these disputes involve only issues affecting tax liability. But others arise largely from a real or perceived abuse of authority, lack of response or over-reaction to the situation by one of the parties. These conflicts rarely reach the courts, and those taxpayers who may wish to pursue the matter administratively often look in vain for an effective mechanism for processing their complaints.

While a taxpayer who disagrees with a Service representative over a question of tax liability has open to him well marked routes of administrative and judicial review, and the Taxpayer Service Division provides adequate treatment for those complaints addressed to systemic dysfunctions, such as erroneous bills, unintelligible notices, and computer errors, those complaints which are addressed to the conduct or misconduct of Service personnel are subject to only an informal and largely *ad hoc* system of review, which varies with the organizational unit in which the complaint arises or in which it is received. The present system for handling such complaints lacks credibility because of its very formlessness and because it frequently involves review of complaints by those with direct supervisory responsibility for the action or personnel complained of.

In our judgment there is need for a new organizational mechanism within IRS with the function of receiving, evaluating and responding to taxpayer complaints. The Service's duties might be more easily discharged, and both its image and public awareness of its problems would likely be improved by a responsive taxpayer complaint-handling device. We believe that a procedure can be created which will fit within the existing system and will not adversely affect the basic responsibility of the Service for collecting the revenue.

The collection responsibility is indeed a most crucial one and the Service's effectiveness in this role must not be undermined. It is important that any device chosen not be one which lends itself to use by taxpayers in "beating the system." On the other hand, the effective collection of taxes would be enhanced rather than undermined by the presence of competent and understanding persons available to correct misunderstandings and unreasonable attitudes or to help avoid hardship.

A mechanism for the handling of taxpayer complaints should be (1) independent; (2) expert within its sphere of competence; (3) widely available; (4) highly visible; (5) client-centered; and (6) capable of developing general recommendations for the improvement of complaint-producing situations.

Therefore, *it is recommended* that the Service establish regular procedures for receiving, processing and resolving taxpayer complaints about the conduct of individual IRS employees. This complaint handling function might be placed in any of several existing organizational units of IRS, but its personnel should be independent of the line organizations where the complaints are likely to arise. The procedures should be well publicized, and they should be designed and operated to provide for line management the information necessary for taking corrective action with respect to the particular complaint and the more general problem areas.

CHAPTER 6 — CONFIDENTIALITY OF TAX RETURNS

The individual taxpayer expects that his income tax return will be treated as confidential by his government. It is a reasonable expectation since the taxpayer, under pain of financial penalties or even imprisonment, is required to provide information on his tax return that provides a skeletal yet revealing profile of his personal and financial life.

To a large though decreasing degree, the expectation is fulfilled. Information contained in tax returns is not made available to the general public. In fact, there have long been penalties under the tax code against unauthorized disclosure of information in tax returns by Federal or state employees. Since information on tax returns generally has not been available to the public, there is a widespread impression that tax returns are confidential documents. Indeed, public figures have contributed to this impression by consistently referring to tax returns as if they were documents locked away in the Internal Revenue Service's vaults. Increasingly over the past half century, however, this public impression has been more myth than reality.

Beginning about 1920, without a change in the tax code, there has been a gradual administrative erosion of the confidentiality of tax returns. The government continues to maintain their confidentiality so far as the general public is concerned. Within the government, however, the returns more and more have come to be viewed as a general resource available for purposes going far beyond the administration of the tax laws. Tax returns have become readily available sources of information, used by the government to study the population in general and to investigate individuals in particular.

As a result, within the government there has been a dissemination of tax returns going far beyond the Internal Revenue Service. Federal agencies, such as the Census Bureau, receive "raw" tax data from tax returns in the form of IRS computer tapes for use in a host of business and economic studies and analyses. States receive tax return information to help in the administration of their tax laws. Committees of Congress, including those not involved in the writing of tax laws, can and do obtain tax return information. The Department of Justice systematically obtains returns for use in civil cases as well as for use in developing criminal charges that do not involve violation of the tax laws. The White House and other Executive agencies routinely obtain "tax check" reports on persons under consideration for government jobs. In the wake of the Watergate affair, there also are questions as to whether the White House has not obtained access to tax returns for political purposes.

One of the striking features of the broadening dissemination of tax returns within the government is that it has occurred largely through regulations prepared only by the Executive branch rather than as a result of laws passed by Congress. Certainly, a practice that is based on largely unpublicized administrative decisions and which departs significantly from concepts of confidentiality commonly held by the public and Congress is open to question and needs basic reexamination.

Disclosure of Tax Returns to Other Executive Agencies

The extent to which tax returns should be available for legitimate functions of the Federal government apart from collection of taxes is a question fraught with deep and difficult philosophical and legal issues. At least in principle, a strong case can be made that tax returns should be an instrument for administering the tax laws and nothing more. Certainly, the opportunity for invasion of citizen privacy increases when a tax return escapes the grasp of the Internal Revenue Service. On the other side, an argument can be made that non-revenue use of tax returns can frequently serve a meritorious social purpose. Some uses would seem more meritorious and less intrusive than others. For example, some would see little harm in the use by the Census Bureau of computerized tax return information to distill purely statistical data about the population in general, but would shudder at the thought of the Department of Justice "fishing" through individual tax returns to develop leads in non-tax criminal cases. Others, however, might consider it the duty as well as the right of the government to use all information available to it, including tax returns, in the drive against organized crime.

Legal and constitutional issues also abound, stretching from the individual citizen to the presidency. For example, after the Watergate experience, many consider it highly important to place restrictions on the availability of tax return information to the President. Considering, however, the broad constitutional authority that the President has over any officer of an Executive agency, there may be a problem in establishing viable restrictions over his access to data in the hands of the Internal Revenue Service. On the individual level, the prosecutorial use by the Justice Department of information obtained from tax returns, which taxpayers are required to prepare fully and truthfully under penalty of law, must be balanced against the individual's protection under the Fifth Amendment against self-incrimination.

The dichotomy between tax returns being viewed as confidential documents and as governmental assets is embodied in the tax code itself. Section 6103, which is the basic policy provision in the code dealing with confidentiality, states that tax returns "shall constitute public records" and "shall be open to inspection only upon orders of the President and under rules and regulations prescribed by the Secretary [of the Treasury] or his delegate and approved by the President." The result is an outwardly contradictory and confusing concept that tax returns are to be "public" records but are to be made available only at the order of the

President. By interpretation and practice, “public” has come to mean records belonging to the government rather than the general public.

The dichotomy has its historical antecedents in the first income tax laws passed during the Civil War. From the start there was a debate over whether tax returns should be generally available to the public or should be confidential documents available only to the government. The furor over publicity of tax returns, interestingly, was one of the central causes of the early demise of the income tax as a revenue-raising instrument after the Civil War. By 1909 and 1910, when an excise tax was imposed on corporations, the weight of Congressional opinion had come down on the side of confidentiality, built around the concept that has persisted until today that tax returns were “public records” with access to them controlled by the President and the Secretary of the Treasury.

The 1913 Act that imposed an income tax upon individuals perpetuated this somewhat ill-defined confidentiality concept. Embodied in this concept was the embryonic notion that tax returns were generalized government assets — a notion that was to flourish as the government became infiltrated first by statisticians and later by computers. Under regulations carrying out the 1913 law, inspection of individual tax returns was denied to anyone not an employee of the Treasury Department. Release of returns was allowed only in legal proceedings to which the United States was a party.

By 1920, however, the regulations were relaxed. Government agencies other than the Treasury Department were permitted, at the discretion of the Secretary of the Treasury, to inspect both corporate and individual income tax returns. At the same time, the Executive branch repealed a regulation, dating back to the 1909 law, permitting public access to certain corporate returns. Thereafter, the public would be denied unrestricted access to any returns, but governmental access to returns would be broadened. State tax officials were added in 1921 to the governmental group permitted access to returns. In 1930, President Hoover set a significant precedent by approving a regulation authorizing the Department of Commerce to inspect returns for statistical purposes. In 1933, President Roosevelt approved a regulation permitting a special Senate Committee investigating air mail contracts to examine returns, and in 1935 the examination rights were extended to another non-tax-writing Congressional committee. These precedents were but the first drops of a gentle rain which nearly became a downpour, with later presidents issuing at least 110 Executive orders permitting various Congressional committees to inspect tax returns.

A broad overhaul of the regulations in 1938 greatly facilitated access to returns by United States Attorneys and attorneys of the Justice Department for use in cases not involving tax violations. Later the same year, the regulations were amended to permit any government agency to obtain tax return information for evidentiary use in proceedings conducted by or before it and to which the United States was a party. The 1940's, 1950's, and 1960's were marked by almost unrestrained growth in the access to tax returns by government agencies, largely for statistical purposes.

The early 1970's saw the first steps to stem, if not yet reverse, this tide toward ever greater governmental access to tax returns. The processing of requests by U.S. Attorneys, or by attorneys of the Department of Justice, for returns to be used in non-tax litigation, or for use in grand jury proceedings, was shifted from District Directors of the Internal Revenue Service to the National Office of IRS. Regulations were amended to deny to Justice Department attorneys access to tax returns for examining prospective jurors. After Congressional protests, a proposed regulation authorizing the Agriculture Department access to tax returns of farmers for a proposed economic study of the farming industry was withdrawn. More detailed rules for White House access to tax returns were developed. And finally, the definition of "return" was broadened to include any information related to the return "or other written statements filed on behalf of the taxpayer." It was provided that these internal documents relating to a taxpayer's return would be available "only in the discretion of the Secretary [of the Treasury] or the Commissioner [of Internal Revenue] or the delegate of either."

The growth of governmental access to tax returns has been based on a somewhat ambiguous statute which, in all significant respects, has been unchanged since 1910. Thus, the story is one of exercise by the Executive Branch of discretion granted by a Congress unwilling to define precisely the policy to be followed. Having granted such discretion, Congress should not be surprised that the Executive Branch has exercised that discretion.

Despite the growth in governmental access, the thought persists in Congress, and among the public as well, that tax returns are generally confidential. There seems to be little public awareness that the principle of confidentiality has been progressively eroded by administrative process. For all its ambiguity, the current statutory language is more consistent with the concept of confidentiality than with present governmental practices. Given this fact, and the public assumption that tax returns are confidential, there seems little to justify the exploitation of tax returns for investigative purposes, particularly on a dragnet basis, as is now done by the Justice Department. There is no use of tax returns more in conflict with the principle of confidentiality than their use for investigative purposes. Information on tax returns which most people assume is confidential, and which is obtained under compulsion, is being used by the government to investigate crimes unrelated to the tax laws.

There are basically two methods by which government agencies obtain tax returns from the IRS. One is under a so-called "catchall" regulation which permits an agency to have its executive head request inspection by an agency employee in connection with a matter officially before the agency. The request must be in writing, signed by the agency head, and must set forth the name and address of the taxpayer, the type of tax, the period covered by the return, and the reason for the inspection. Nominally, the Secretary of the Treasury or the Commissioner of Internal Revenue retain discretion to deny inspection. In practice, however, such discretion is rarely exercised, although the Commissioner may request clarification of the request or seek to limit inspection to information clearly pertinent to the request. In principle, the agency head must specify why inspection of a tax return is necessary but in practice many of the requests are vague and indefinite, frequently stating only, for example, that an investigation is underway in a certain area and that the return is needed. As a result, the requirement for a statement of reasons for inspection, which was supposed to provide a discretionary restraint, has become largely a charade.

The second method to obtain tax returns is through the existence of so-called "blanket" authority, approved by the President, for an agency to inspect returns. The regulations providing for "blanket" authority generally state the circumstances under which inspection will be permitted and do not impose the procedural requirements of naming a taxpayer, giving an address, stating the type of tax and return period. While the language of such regulations state that the Treasury Department "may" furnish the requested information, this has not generally been interpreted as giving the Department discretionary authority to refuse the information.

By and large, requests under the "catchall" provision are for investigative purposes. On the other hand, the majority of returns requested under the "blanket" regulations are for the purpose of gathering statistical data. The "blanket" regulations, thus, are designed for large-volume users of tax returns who have general rather than specific reasons for their use and are interested in the returns of classes or groups of taxpayers rather than in those of specific individuals.

The inspection of tax returns by Justice Department attorneys and U.S. Attorneys is governed by a separate set of special "investigative" regulations. These provide that a "return . . . shall be open to inspection by a United States Attorney or by an attorney of the Department of Justice where necessary in the performance of his duties." Under these regulations, the request must be signed by either the Attorney General, Deputy Attorney General or an Assistant Attorney General if the information is needed by a Justice Department attorney, or by a United States Attorney if the return is needed by him. The regulations specify that the request must state "the reason why inspection is desired," but most of the requests do not make precisely clear why access to a tax return is needed. Another "investigative" provision provides that a United States Attorney, or an attorney of the Department of Justice, may obtain tax returns "for official use in proceedings, before a United States grand jury, or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings."

Prior to 1970 the Service kept only sketchy statistics on requests by government agencies for tax returns. Since that time, however, it has made a semi-annual report to the Congressional Joint Committee on Internal Revenue Taxation setting forth the number and types of tax return requests as well as a summary of the reasons given by the agencies for requesting the information. The semi-annual report for the first half of 1974 shows the following data concerning requests for tax returns by various federal agencies:

Requests pursuant to blanket regulations:

Agency	No. of Returns
Department of Health, Education & Welfare	3,895
Department of Commerce	20,000,000
Renegotiation Board	867
Federal Trade Commission	58,729

Requests pursuant to catchall and investigative regulations:

Agency	No. of Requests	No. of Taxpayers	No. of Returns
Department of Agriculture	1	3	3
Department of Commerce	1	5	5
U.S. Customs Service	1	3	12
Federal Deposit Ins. Corp.	1	12	12
Federal Home Loan Bank Board	2	28	112
General Accounting Office	1	342	342
Interstate Commerce Commission	2	9	45
Department of Justice (other than U.S. Attorneys)	226	2,087	6,114
United States Attorneys	852	2,635	9,570
Department of Labor	1	2	6
Securities and Exchange Comm.	10	55	238
Renegotiation Board	1	11	21
	1,099	5,192	16,480

The tax information supplied by the IRS varies considerably, depending upon whether it is requested under the "catchall" or "blanket" regulations. In the "catchall," investigative request, the IRS tends to turn over the actual return of a taxpayer. Under the "blanket" authority, most agencies do not get the return itself but only data taken from the return. The Bureau of Census, for example, frequently gets only entity data — such as name, address, and social security number. It may also obtain financial data in the form of a computer tape containing information which is limited to amount and type of income, and information relating to deductions.

What information is made available by the IRS under an investigative request is complicated by the Service's bifurcated definition of what constitutes a "return." A return is first defined as including "information returns, schedules, lists and other written statements filed by or on behalf of the taxpayer" as well as audit reports, claims for refund, and notices of over-assessment or adjustments. Under the "catchall" regulations, a Federal agency is entitled to obtain all information falling within these categories. There is, however, a second grouping of information, embracing, for the most part, material prepared within the Service, such as work papers of examiners, cover letters, reports of special agents, and inter-office communications. This latter material (which embraces information obtained from third parties, including voluntary informants, IRS investigative reports, and data obtained by third-party summonses) is not available as a matter of right to the requesting agency but "only in the discretion" of the Secretary of Treasury or the Commissioner of Internal Revenue. In response to investigative requests, however, the Service usually will produce both the documents filed by the taxpayer as well as most material prepared inside the IRS, including conferences' and revenue agents' reports. Some information, such as work papers of examiners, cover letters, reports of special agents, and inter-office communications, may be obtained only with the express authorization of the Assistant Commissioner for Compliance.

The problem of defining the information to be covered by a "return" has been further complicated by a 1972 amendment to the regulations redefining the nature and coverage of a "return." Instead of providing, as in the past, that internal IRS documents could, in the Commissioner's discretion, be made part of the return, the 1972 change provides that all such internal documents are considered part of the return.

While the Service and the Treasury Department deny the suggestion, some observers believe that the reason for the 1972 change was to sweep internal IRS documents into the definition of a return, thus preventing their disclosure under the Freedom of Information Act which came into force in 1967. The IRS has contended that the objective of the 1972 change was to extend the basic policy of confidentiality to "every item in our computers, to every memorandum, report or document." At the same time the Commissioner of Internal Revenue has sought to maintain discretion over the release of the "associated" internal documents. Whether this effort to retain discretion will be successful is open to question. The Service has now defined the associated documents as part of the return, and there are numerous regulations that require disclosure of returns. There is therefore an apparent inconsistency between the mandatory disclosure of returns and the IRS effort to retain some discretion over release of the "associated" documents.

Agency Use of Tax Information

The principal, most consistent users of tax return information have been the Department of Justice, the various United States Attorneys, the Bureaus of the Census and of Economic Analysis of the Department of Commerce, the Social Security Administration, and the Federal Trade Commission. In addition, over the years, such tax information has been used by more than two dozen other departments and agencies, largely for investigative purposes. The purposes have ranged from investigation of profits on charter flights by the Civil Aeronautics Board to alleged kickbacks by a borrower from the Rural Electrification Administration.

By far the biggest user of income tax return information is the Department of Commerce. Almost all of the Commerce Department's use of tax information is by the Bureau of the Census and the Bureau of Economic Analysis. For business surveys during the first half of 1973, the Commerce Department requested, under its "blanket" regulation, information appearing on 75,000 partnership tax returns, 1,042,000 corporate income tax returns and 6,705,000 proprietorship returns. The Department also received information on 78,216,000 individual returns for use in updating the Population Migration Study and Revenue Sharing Estimates.

The Census Bureau first began using tax return data in 1944 and by 1950 had concluded they constitute a very economical, accurate basis for making economic and social surveys. Four types of census and survey activities are performed by the Bureau utilizing tax return data. One is the Economic Census which covers manufacturing, mining, retail and wholesale trade, service industries, construction, and transportation. This census, conducted every five years, provides a primary source of facts about the structure and functioning of the nation's economy. A second is the Census of Agriculture, also quinquennial, which provides data concerning farm size, type, tenure, form of organization, and market value of products. A third survey conducted by the Census Bureau with use of tax data is the compilation of Current Economic Indicators, a broad series of weekly, monthly, quarterly and annual surveys of trends in trades and industries. Finally, the Bureau conducts a Survey of Minority-Owned Business Enterprises to develop data on the extent and growth of minority participation in private enterprise.

Aside from these four surveys, the Census Bureau conducts a Demographic Statistics Program to furnish population and per capita income estimates on which to base allocation of revenue-sharing funds to state and local governments. Tax information also permits the Bureau to obtain data on migratory patterns within the national population.

The Bureau of Economic Analysis makes much more limited use of tax return information, deriving most of the tax information it needs from the Statistics of Income, an annual publication of statistical material derived from tax returns. Other agencies making use of tax return information for statistical surveys are the Federal Trade Commission and the Renegotiation Board.

Most statistical uses of income tax information are for compiling what are regarded as essential economic data for government planning. In many cases, the tax return information serves the purpose of identifying further sources of information. In other instances, the return information itself is converted into statistical information. Most of the tax return information is transmitted by the IRS in a form that makes identification of the individual taxpayer either difficult or impossible. Not only is the anonymity of taxpayers preserved, but also the material is handled by department and agency offices and bureaus having no power to take actions affecting directly the taxpayers whose returns are furnished. Hence, this type of disclosure of tax information would seem the least offensive of all as an infringement upon the complete confidentiality of tax returns. Whatever small infringement may exist, it appears to be far outweighed by the benefits of obtaining objective information on which to base national government economic and social policies.

To the concern of the Census Bureau, the Service recently has adopted new procedures which may reduce the availability of tax data for statistical purposes. The Service apparently has concluded that income tax data should be available for statistical purposes only if (1) the data are absolutely essential and (2) no satisfactory substitute can be found. The revised procedures apparently reflect a new policy emphasis by the IRS upon protecting the confidentiality of tax returns.

Another potential restriction on the dissemination of tax return information is presented by the Privacy Act enacted in 1974. One of the principal purposes of the Act is to restrict the use by Federal agencies of information about individuals to the purposes for which it was obtained. In principle, this objective conflicts directly with the use of tax returns for statistical or non-tax-related investigative purposes. In a key provision, the Act provides that no agency shall disclose any individual's record to another agency except with the written consent of the individual to whom the record pertains. The provision, however, contains exceptions, pertinent to the use of tax returns, stating that consent is not required for either "routine use" of the record or for "civil or criminal law enforcement activity." Privacy Act guidelines issued by the Office of Management and Budget to implement the law appear to take the position that disclosures to other Federal agencies by IRS of individual tax returns to be used for statistical or investigative purposes may be described as "routine use," thus exempting tax returns from the restrictions on disclosure of the law.

Aside from statistical purposes, the largest use of tax return information by government agencies is for investigating possible violations of laws other than the tax code by the Justice Department, United States

Attorneys and the Securities and Exchange Commission.

The majority of the returns requested by the Justice Department are for criminal investigations, particularly by "strike forces," the interagency task force created some 15 years ago to provide a coordinated attack on organized crime. The strike force concept has become inextricably linked to the use of tax returns for the investigative purposes. Service representatives from the Audit and Intelligence Divisions have been assigned to the strike forces to help single out individuals for investigation. In addition, the Service has placed itself in the position of volunteering tax information to the Justice Department, particularly when it desires to have a taxpayer selected as a strike force target. The IRS engages in this act of voluntary disclosure by sending the name of a suspected law violator to the Justice Department with the notation that the Service may have information on the taxpayer which Justice may find useful. Under the appropriate regulation, the Justice Department then requests and obtains the information from the IRS. To do this, the IRS has had to make a dubious interpretation of a provision in the tax code (Section 7213) which prohibits disclosure of tax returns by IRS personnel. The IRS rationale is that the prohibitions apply to information in the tax return and not to the name of the taxpayer. From June 1, 1973, through October 31, 1974, 240 taxpayers were so "voluntarily" identified to the Justice Department by the IRS.

Among U.S. Attorneys there has been a growing demand for tax returns for investigative purposes as they have adopted the task force approach toward crime. Disclosure of tax return information to U.S. Attorneys poses a particular problem in protecting the confidentiality of such information. U.S. Attorneys are political appointees who very often harbor political ambitions. Placing confidential material in their hands raises a potential for political abuse.

The use of tax returns for investigative purposes generally raises a multitude of legal and administrative problems. By far the most serious problem is whether the disclosure of information, provided by the individual taxpayer on his tax return, for use in prosecution for non-tax crimes, violates the Fifth Amendment protection against self-incrimination. The preparation and filing of truthful and accurate tax returns is compelled for reasons unrelated to criminal law. Subsequent use of the information from tax returns for prosecutorial purposes in a non-tax proceeding raises difficult questions about the scope of the protection against self-incrimination in a mandatory, self-assessment taxation system. Until recently, no court had squarely faced the issues presented by the use of a taxpayer's return in non-tax criminal cases. The issues have now been raised in the case of *Garner* v. *United States*, which was heard by the Supreme Court on November 3, 1975. Garner was prosecuted and convicted for Federal gambling violations. The principal items of evidence were his tax returns, which revealed that almost all of his income was derived from wagering.

Administratively, the IRS's close involvement in criminal law enforcement raises the serious problem that the Service may be diverting resources and energies away from its primary job of collecting taxes and enforcing the tax laws and in the process acquiring a punitive public image as a law enforcement agency. It was a possibility recognized by Commissioner of Internal Revenue Donald C. Alexander, who in a 1974 speech warned that the emphasis on non-tax criminal law enforcement could "be jeopardizing our traditional tax administration processes, both from the standpoint of the most effective use of our resources and from the standpoint of the public's faith in an impartial, non-political tax system." In announcing that the Service would withdraw the Audit Division representative from Strike Force teams, Mr. Alexander said, "The overall emphasis of our criminal enforcement activities has been shifted away from special enforcement programs, such as narcotics traffickers and strike forces, and has been aimed more directly toward the taxpaying public in general."

The most general and perhaps most fundamental recommendation growing out of this report is that disclosures of income tax returns and tax return information (as covered by the Service's present definition of "return") of individuals and decedents, by the Internal Revenue Service to any persons or officials outside the Service should be made only as permitted by express statutory authorization designating the persons to whom and the purposes for which disclosure may be made, the procedures governing such disclosure, and limitations on use or redisclosure that shall govern such disclosure. The execution of this recommendation would entail the enactment of legislation establishing the foregoing principle and repealing the authority now provided in Section 6103(a) of the tax code for inspection or disclosure of tax returns upon order of the President and under presidentially approved rules and regulations of the Secretary of the Treasury or his delegate.

The purpose of this recommendation is to lodge exclusively in the Congress the responsibility for determining what uses and disclosures of tax returns, pertaining to individuals and decedents, may be made for purposes other than those necessary for the administration of the Federal revenue laws by the Internal Revenue Service. Execution of this recommendation should serve to stanch once and for all the flows of such tax returns resulting from purely administrative action, taken with little or no publicity, and for reasons of administrative efficiency or convenience. The intent of requiring that the Congress determine each type of disclosure of individual tax returns to be made for any purpose unrelated to administration of the tax laws is to maximize the likelihood that members of the taxpaying public will have knowledge of any proposal for such disclosures and opportunity to influence the determination to be made by the Congress; it is expected that in this way there will be a careful balancing of conflicting interests at stake in the determination, including, on the one hand, those of effective tax administration and personal privacy and, on the other hand, enhanced convenience or efficiency in prosecuting various governmental or societal purposes.

Another principal recommendation growing out of this report is to constrain the authority of the Internal Revenue Service to transfer tax return data pertaining to individuals and decedents to other Executive agencies. The Service should be prohibited from disclosing individual and decedent tax return and associated information to another government agency for use in criminal or civil investigations unrelated to administration of the tax laws. Pursuant to the recommendation, each tax return could still be turned over to the Justice Department or a U.S. Attorney for use in civil or criminal litigation involving the tax laws. Returns also could be provided to the Treasury Department for tax policy-making, to the Commerce Department's Bureaus of the Census and of Economic Analysis for statistical studies, to the Social Security Administration for administering the Social Security Act, and to the Labor Department and the Pension Benefit Guaranty Corporation for administering the Employee Retirement Income Security Act. Any Federal department or agency authorized to receive individual tax returns in a form permitting identification of a taxpayer should only be able to do so if it has legally binding procedures acceptable to the IRS to insure that the returns may not be used or redisclosed for any purpose other than for which the returns were provided.

Another approach to limiting disclosure of tax returns by the Service which deserves consideration has been proposed by Senator Joseph Montoya as Chairman of the Senate Appropriations Subcommittee overseeing the IRS. The Montoya Bill (S.1511) would provide that a Federal or state agency could inspect a tax return in non-tax cases only if it obtained a court order showing that the information in the return was necessary for the investigation and that no alternative source of information was reasonably available.

White House Access to Tax Returns

In recent decades there has been a lingering suspicion that given the awesome power of the presidency over the bureaucracy, the White House had undue access to tax returns and was perhaps using them for political purposes. The suspicions seemed to be confirmed by events in recent presidencies. Early in the Kennedy Administration, Carmine S. Bellino, a special consultant to the President, entered into arrangements with the IRS to inspect tax returns and associated documents. Similarly, in the Nixon Administration, Clark R. Mollenhoff, Deputy Counsel to the

President, reached an understanding with the Commissioner of Internal Revenue concerning the inspection of tax returns. So far as is known, neither individual had an actual presidential order to inspect tax returns. They merely exercised the influence of the White House to obtain access to tax information. In the course of the Watergate investigations, further evidence was developed that tax return information was improperly transmitted to the White House.

The Watergate experience made it clear that the unfettered ability of White House employees to obtain tax return information presents distinct potential for abuse. This was acknowledged by President Ford, who, a few weeks after assuming the presidency, issued an Executive order designed to control White House access to tax information. The Ford order had three key provisions: 1) returns "shall be delivered to or open to inspection by the President only upon written request signed by the President personally;" 2) any such request for tax return data shall be addressed to the Secretary of the Treasury and shall state the name and address of the taxpayer, the kind of tax, and the taxable periods involved, and 3) the President "may designate an employee or employees of the White House office who are authorized on behalf of the President to receive any such return . . ." Interestingly, the order does not require that the President specify why a tax return is needed although such a requirement is generally placed on executive agencies seeking tax information from the Service.

If reform is needed in this area — and it seems agreed that it is — the question is whether it should take the form of administrative change, such as that ordered by President Ford, or statutory change by Congress in the basic law. Statutory change has the advantage of relative permanency. An Executive order, on the other hand, is subject to modification at the discretion, or even the whim, of a President. While it is difficult to imagine a President having the temerity to alter the general approach of the Ford Executive order in the foreseeable future, a change could well be made once public concern over the problem has subsided. Relaxation of legislatively imposed standards would come far less easily and presumably would attract public scrutiny.

Statutory restrictions may raise a question as to whether Congress would be unduly curbing the President's constitutional authority to see that the laws are faithfully executed. If the President is to carry out this authority, he must in principle have access to information within the Executive branch. Such a constitutional issue, however, does not seem insurmountable, particularly if the statutory restrictions stop short of a complete prohibition on the disclosure of tax return information to the President.

A statutory change which falls short of a complete restriction would still constitute a considerable improvement over present law and practice. Accordingly, *it is recommended* that legislation be enacted restricting the availability of tax returns to the Executive Office of the President. If such legislation is to be effective, it must incorporate certain safeguards. First, the request for tax data should be signed by the President personally. Second, the request should designate, by name, the White House employee or employees to whom the tax data may properly be furnished by the IRS. Third, the presidential request should state in a full and complete manner why the tax return information is desired. Fourth, some procedures should be required to control dissemination of the information once it is obtained by the White House and to provide for its eventual return to the Internal Revenue Service. Fifth, an outside group, such as the Congressional committees having jurisdiction over tax matters, should periodically be informed by the Service of the instances in which the White House has requested tax information.

Of these proposed safeguards, two are of critical importance to the prevention of political misuse of tax return information by the White House. One is the requirement that the President state in full his reasons for wanting to see a tax return. The other is the provision for periodic review of the Presidential requests by appropriate Congressional committees. If the reasons for a request must be stated fully and accurately, it is less likely that a President would attempt to obtain tax return information for political purposes. The possibility would be lessened further if a President realized that his requests would be reviewed by Congressional committees.

Another questionable tax practice initiated by the White House and now widely followed within the Executive branch is the somewhat secretive check on the tax status of individuals under consideration of appointment to Federal jobs. Since 1961, the so-called "tax checks" have become part of the "character investigations" of prospective appointees conducted by the Federal Bureau of Investigation. Upon a request by the FBI, the Service furnishes information on whether the individual has paid income taxes, liens, criminal tax investigations or civil penalties for fraud and negligence. Tax checks are an example of how a practice, which started out as a device to check on a few high-level presidential appointees, can be copied and spread throughout the Executive branch. The White House requests tax checks concerning all its own appointees — from gardeners to cabinet ministers. Other departments of the Executive branch usually reserve the tax checks for high level positions.

During the recent years, the White House and other Executive agencies have requested total numbers of tax checks as shown in the following table:

	1966	1967	1968	1969	1970	1971	1972	1973	1974
White House	547	583	880	1263	868	1134	915	1081	1045
Department of Justice	547	495	517	1424	1162	1274	772	999	335
Department of Treasury	91	240	89	258	412	233	393	397	775
Department of State	242	16	9	5	4	76	105	113	148
Department of Commerce	75	67	74	113	133	94	114	121	106
Department of Agriculture	0	0	0	69	183	72	—	—	—
Export-Import Bank	0	0	0	0	16	17	9	13	15

Apparently there are two rationalizations for the tax check. The first is that the tax status information has some relevance to the competence or fitness of the individual for a public job. The second is to spare the President the embarrassment of appointing someone with serious recent or current tax trouble. Both justifications sidestep the possibility that the prospective employee could be required to furnish copies of his tax returns or alternatively, as would now seem to be required under the Privacy Act, could give his written consent to inspection of his tax returns. Such directness, however, would frequently undercut the secret manner in which individuals are considered for Federal positions.

Some procedural steps have been taken by the Service to lessen the likelihood of abuse, such as requiring that there be a written request for a tax check and that the President designate the individuals authorized to receive the tax information. Even with such improvement, the procedure may be open to abuse, but at least, as Commissioner of Internal Revenue Alexander put it, the creation of a "paper trail" on a tax check should permit "rights . . . (to) be better protected in the event that anyone should try to abuse this particular procedure."

Access to Tax Information by Congressional Committees

Three Congressional committees — the House Committee on Ways and Means, the Senate Committee on Finance and the Joint Committee on Internal Revenue Taxation — are specifically authorized under the tax code to receive and inspect tax returns. Such inspection presumably is needed either as part of their tax oversight function or as an aid in the drafting of tax legislation.

Other Congressional committees, to obtain access to tax returns, must request a Presidential Executive order, the request stating the general purpose of the inspection. Since the 1930's, it has been the general practice of the White House to comply with such requests from Congressional committees. Surveys show, however, that the number of tax returns requested by the committees are relatively few in number. It is estimated that no more than a half-dozen requests for income tax returns have been made by the three tax law writing committees in the last ten years. Other Congressional committees authorized by executive orders to obtain tax returns also have used the authority sparingly.

While Congressional examination of individual tax returns may serve a legislative purpose, quite obviously there is a thin dividing line between obtaining tax information for purposes of legislating and obtaining such information for purely investigative purposes. It would appear that some committees use tax data for the purpose of developing investigative leads. To the extent that such information is used for public hearings or is forwarded to prosecutorial agencies, the Congressional practice of using income tax returns for investigative purposes would seem to raise the same problems of infringement upon confidentiality presented by the Justice Department's access to tax returns. Furthermore, with tax returns in the hands of Congressional investigators, there is an obvious potential for political abuse.

In order to help assure explicit, deliberate, and responsible Congressional attention to the use made by its members and committees of individual tax returns, *it is recommended* that the existing statutory authority (Section 6103(d) of the tax code) for disclosure by the Internal Revenue Service to the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Internal Revenue Taxation, be continued. Disclosure of tax returns by the Service to any other committee of the House or Senate, or joint committee of the Congress, should by statute be permitted only in accordance with specific authorization for such disclosure by a resolution of the House or Senate, or both.

Inspection of Tax Returns by State and Local Governments

Since 1935, the tax code has permitted inspection of Federal tax returns by state tax administrators (Section 6103(b)). Returns may be inspected only for state tax purposes or to obtain information to be furnished local tax authorities. Eleven states have chosen to make this inspection by examining and copying returns in an office of the Service. Another 38 states carry out inspection by obtaining computer tapes drawn from the IRS Individual Master File, which contains enough information to compute taxable income but not enough to reproduce the return of a taxpayer.

The release of Federal tax information to state officials raises an obvious concern over maintaining the confidentiality of the tax returns once they are in state hands. To a large extent, this concern is now met through so-called Agreements on Coordination of Tax Administration entered into between the Federal government and the individual states. All states except Texas and Nevada have entered into such agreements. The agreements spell out the mutual obligations in handling the tax returns and usually require the states to make available certain tax information to the Federal government. Recently the agreement has been tightened by imposing additional requirements for safeguarding tax information.

Basically, the agreement is a representation by a state that it will adhere to certain standards and procedures for protecting the confidentiality of tax returns. State employees also are covered by the provision in the Federal tax code (Section 7213) that imposes a criminal penalty on unauthorized disclosure of income tax information. Some uncertainties develop, however, in applying this provision to state officials since the information disclosed may have come from state individual tax records and not have been acquired directly from inspection of Federal tax returns. In some states the taxpayer submits schedules or other information to the state identical to what he has prepared for his Federal return.

If a state fails to live up to the standards required in the agreement, the Service may terminate the agreement for exchange of tax information. The Commissioner of Internal Revenue, however, lacks clear authority to pass judgment on the safeguard procedures of the individual states. *It is recommended*, therefore, to provide by statute that the Commissioner has not only the authority to review state confidentiality safeguards but also the authority to suspend a state's access to Federal tax returns if the Service finds its procedures are unsatisfactory. Furthermore, through changes in the tax code, it should be made clear that establishment of adequate laws and procedures safeguarding Federal tax return information in the hands of state tax agencies — whether the information was obtained from the Internal Revenue Service or from the taxpayer himself — is a necessary prerequisite to a state obtaining Federal tax returns.

Unauthorized Access to Returns by IRS Employees

With the multitude of records that exists in numerous forms in Service files, there obviously is a potential problem that a taxpayer's right to confidentiality may be violated by unauthorized examination or improper use of tax return information by employees of the Service. Abuse of tax returns by Service employees may be motivated by any number of reasons. During the Watergate investigation, instances were uncovered of employee access to tax returns solely for political purposes.

Every year, IRS employees make about 18 million requests for tax return information on file in Federal Record Centers. The objective of course is to make sure that all of these requests are legitimate. Information stored on computer tapes seems to be fairly well guarded against unauthorized access, but the Service's procedures for guarding hard copies of returns appear somewhat casual. In the millions of requests processed by the Federal Records Centers, a permanent record of who requested the return is maintained in only about two-thirds of the cases. If no action is taken on a requested return, the return is refiled and the requisitioning document identifying the Service employee is destroyed. In such "no action" cases, abuses obviously could arise with a photocopy quickly made of a return, which would then be returned to the file with no record showing that it had even been removed.

Partly as a result of the disclosures in the Watergate investigations, the Service is now moving to improve and strengthen its internal procedures for protecting returns against unauthorized access. As steps in that direction, *it is recommended* that the Internal Revenue Service adopt procedures that would provide for periodic monitoring of returns requisitioning by Service employees; establishment of statistical records designed to reveal patterns of frequency in, and reasons for, requisitioning returns; and preservation of return-requisitioning documents as part of the permanent file of every return.

Notice to the Public About Tax Return Disclosures

To maximize citizens' awareness of the ways in which their tax return information may be used, *it is recommended* that the Internal Revenue Service place on tax return forms a concise statement describing the disclosure, for uses unrelated to the administration of Federal tax laws, that may be made of information supplied in such returns. The statement should include reference to a public document, prepared and disseminated by the Service, that identifies the governmental agencies and other persons to which disclosures of tax returns are made and the purposes for such disclosures, and fully describes the procedures followed by the Service with respect to such disclosures.

MEMORANDUM IN SUPPORT OF PROPOSED AMENDMENT TO RECOMMENDATION 75–8

Sheldon S. Cohen[*]

At its Thirteenth Plenary session, held December 11 and 12, 1975, the Administrative Conference adopted, among others all pertaining to procedures of the Internal Revenue Service, a set of recommendations grouped under the title, Tax Return Confidentiality (Recommendation No. 75–8) 41 Fed. Reg. 3985–6 (January 27, 1976). The declared purpose of this set of recommendations is "to narrow the authority of the Service to disclose to other governmental agencies tax returns pertaining to the tax liability of individuals and decedents. . . ."

Paragraph (a)(2) of these recommendations states that the term "tax return" as used therein means

> (i) the return itself together with any schedule, list, and other written statement filed by or on behalf of the taxpayer with the Internal Revenue Service which is designed to be supplemental to or become a part of the return, and (ii) other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included in paragraph (a)(2)(i) of this section.

A footnote to paragraph (a)(2) states as follows:

> This definition is taken from Treasury Regulation § 301.6103(a)–1(a)(3)(i). In considering any legislation in this area, Congress should consider the adequacy of this definition, since some technical problems may exist under the present regulation.

The first of the set of Tax Return Confidentiality recommendations adopted by the Conference provides as follows:

> (b) *General.* Legislation should be enacted which would permit the disclosure of tax returns by the Internal Revenue Service only as authorized by express statute designating the persons to whom and the purposes for which disclosure may be made, the procedures governing such disclosure, and limitations on use or redisclosure that shall govern such disclosure.

The chief purpose of this recommendation, which is the most general and the most fundamental of all the Conference's Tax Return Confidentiality recommendations, is to assure that disclosure of tax returns be made by the Internal Revenue Service only on the basis of express statutory authorization that specifies for any authorized disclosure (i) the persons to whom disclosure may be made, (ii) the purposes for which disclosure may be made, (iii) the procedures governing such disclosure, and (iv) limitations on use or redisclosure to govern such disclosure.

The Steering Committee for the Conference's Internal Revenue Service Project, which proposed the foregoing recommendation, intended that three additional purposes be achieved by this recommendation.

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[*] Chairman, Steering Committee for IRS Project

Although these additional purposes were implicit in the Steering Committee's address to the issue of tax return confidentiality, and doubtless also in the Conference's adoption of its first recommendation, it cannot be said that they are clearly inferable from, much less clearly expressed in, the recommendation as formulated by the Committee and adopted by the Conference. These three objectives can be stated as follows:

> (1) that all tax returns pertaining to the liability of individuals and decedents should be held and treated as confidential by the Internal Revenue Service, that is, that such returns should not be subject to disclosure to the public in general, nor to any individual member of the public, as for example, in response to a request made to the Internal Revenue Service under the Freedom of Information Act;
> (2) that any tax return pertaining to the tax liability of an individual or decedent should be discloseable by the Internal Revenue Service pursuant to a request made respectively by such individual or by the authorized representative of such decedent;
> (3) that the Internal Revenue Service should, in making any particular authorized tax return disclosure, limit the amount of information that it discloses to that which is necessary to accomplish the purpose for which such disclosure is authorized.

Perhaps the reason that the recommendation quoted above is silent, or at least not at all explicit, about these objectives is that they were taken for granted as obviously desirable and perhaps thought of as implicit in the general policy reflected by the Steering Committee's approach to the topic of tax return confidentiality. However, because the Conference's Tax Return Confidentiality recommendations are intended to serve as guides for the enactment of legislation that will anchor its policy objectives relative to tax return confidentiality in statutory law, the statement of these recommendations should leave no room for doubt or ignorance as to what the Conference's agreed upon policy objectives are.

New Provision

For this reason, it is recommended that the Conference amend paragraph (b) of its Tax Return Confidentiality Recommendation, No. 75–8, to read as follows:

> *Para. (b) of Rec. No. 75–8 as adopted*
> (b) *General*
> (1) Legislation should be enacted which would permit the disclosure of tax returns by the Internal Revenue Service only as authorized by express statute designating the persons to whom and the purposes for which disclosure may be made, the procedures governing such disclosure, and limitations on use or redisclosure that shall govern such disclosure.
> (2) Legislation should be enacted which would provide that tax returns of individuals and decedents are confidential and, except as specifically authorized by statute, shall not be disclosed by the Internal Revenue Service to the general public, or any individual member thereof, either at the initiative of the Internal Revenue Service or in response to a request for disclosure made to the Service by any member of the general public, provided that such prohibition shall not prevent disclosure by the Service of any tax return of an individual or a decedent upon a request duly made by such individual or his authorized representative or by the authorized representative of such decedent.

> (3) Legislation should be enacted providing, as a general limitation on all tax return disclosure authority conferred on the Internal Revenue Service, that in making any authorized disclosure of a tax return to any person other than the taxpayer to whom the return pertains, the Service shall disclose no more information than is necessary to effectuate the purpose for which such disclosure is authorized and providing further that the Service shall establish administrative procedures designed to assure that every particular disclosure is made in strict accordance with the authority therefor and with such general limitation.

Paragraph (b)(1) is unchanged from its adoption as paragraph (b). Paragraph (b)(2) is designed to make explicit the first two of the additional objectives expressed above and would appear to require no further explanation. Paragraph (b)(3) is designed to make explicit the third of the additional, heretofore implicit, objectives. A few words are in order to explain why the Steering Committee deems it important to incorporate paragraph (b)(3) in the Conference's general recommendation on tax return confidentiality.

The Steering Committee and the Conference subscribe to the objective that information in the files and records of the Internal Revenue Service pertaining to individuals and decedents should be treated as confidential; that is, no such information should be disclosed to the general public by the Internal Revenue Service. For the purpose of applying this general principle of confidentiality, the Conference's recommendation borrowed from existing Treasury Regulations the definition of the term "tax return" embracing all information obtained by the Internal Revenue Service — from whatever source and by whatever means — pertaining to the tax liability of an individual (or decedent). We may regard this as an omnibus definition of tax return which serves well to assure the breadth of application desired for the principle of confidentiality, i.e., non-disclosure by the Service to the general public. The omnibus definition also serves well to provide a blanket prohibition on disclosure by the Service to all governmental agencies.

The omnibus definition of "tax return," however, produces an unintended undermining of another objective to which the Steering Committee (and, we believe, the Conference also) subscribes. This objective is that each disclosure of tax returns made by the IRS (as authorized by the Congress) should be no greater in scope of information disclosed than is necessary to achieve fairly, effectively, and efficiently the purpose for which the disclosure is authorized. This objective might usefully be called the principle of limited disclosure. To adhere strictly to the principle of limited disclosure, each particular statutory authorization for tax return disclosure should specify exactly what information may be disclosed (i.e., only what is necessary for the particular purpose) rather than to speak generally of disclosure of "tax returns." Or if the term "tax return" is to be used, no single definition of the term "tax return" should be used for every disclosure authorization, because not all purposes for disclosure require the same information to be disclosed. And most assuredly, the term "tax return" should not be given the same, *omnibus* definition for all disclosure purposes as it has been given for the purpose of applying the principle of confidentiality. An omnibus definition of "tax return" is necessary to give the confidentiality principle the broad scope intended; whereas the limited disclosure principle will usually be violated by using an omnibus definition of tax return in disclosure authorizations.

There may be a number of disclosure purposes that would require disclosure of only one (or a very few) specifiable item of data, e.g., IRS disclosure of wages and tips subject to social security tax withholding, to the Social Security Administration, for the purpose of maintaining employee earnings records for social security benefit determinations. In this instance, disclosure authorization could be framed to cover only the particular information that needs to be disclosed. In contrast, any and all information obtained by the IRS pertaining to an individual's tax liability might need to be available to the Department of Justice in order for it to carry out effectively the purpose of enforcing the tax laws through court litigations. In the latter instance, it would be easier, more direct, and avoid any risk of inadvertent omission of some necessary items of information from the disclosure authorization, to make the authorization applicable to "tax returns" — relying on an omnibus definition of the term — rather than to try to specify the information in full factual detail.

Other disclosures that might be authorized will lie between the two extreme examples just discussed — one requiring the disclosure of a single item of information and the other requiring, potentially at least, the disclosure of any or all information encompassed by an omnibus definition of tax return. These in-between cases will involve disclosure purposes that require more than a single (or very few) specifiable item of information and *less than* omnibus information availability. For example, there might be a need for IRS disclosure to a National Health Insurance Agency of certain information about health and medical services claimed as itemized deductions by individual taxpayers. For such in-between cases, it may not be possible to specify precisely what information is to be discloseable and yet disclosure authorization framed in terms of the omnibus meaning of tax return would clearly offend the limited disclosure principle.

From the foregoing analysis, it appears that some statutory disclosure authorizations may of necessity or for convenience be drafted to apply to "tax returns" as defined in the same omnibus sense used to establish the principle of confidentiality. Thus the clear risk of violation of the principle of limited disclosure will be inevitable unless a general statement of this principle is embodied as a statutory limitation on all IRS disclosure authority. Hence our proposed amendment of adding new paragraph (b)(3) to the Conference's Recommendation No. 75–8.

Our reasoning and proposed amendment of paragraph (b) may be recapitulated as follows. First, the basic principles of confidentiality and limited disclosure should be established.

1. *Confidentiality* — All information obtained by the Internal Revenue Service (by whatever methods and from whatever sources) which may be pertinent to the tax liability of an individual shall be confidential and shall therefore not be disclosed by the Internal Revenue Service to any person except pursuant to the written request or consent of such individual, or except as specifically authorized by an act of the Congress.
2. *Limited disclosure* — Any act of the Congress which authorizes disclosure by the Internal Revenue Service of any confidential information shall provide for disclosure of no more of such information than is necessary to be disclosed to accomplish fairly, effectively, and efficiently the purpose for which such disclosure is authorized.

Next, we must consider how to provide guidance for the legislative task of framing disclosure authority that will adhere to the principle of limited disclosure. An approach to standards for doing this follows.

For some purposes, it may be necessary that only a very few, precisely specifiable, items of information be available; for these types of purposes, authorized disclosure can and should be limited to those particular items.

For some other purposes, it may be necessary that any or all information be available; for these types of purposes, authorized disclosure should be extended to all information. However, it should also be provided that the items of information actually disclosed in any particular instance of accomplishment of such a purpose must be limited to no more than is necessary for the particular instance.

For all other purposes, it should be recognized that all information will not need to be available, that certain types of information will never be needed, but that what information is needed will be more than a few precisely specifiable items of information, and may vary, depending upon particular circumstances, within a specifiable range or type of information. For these types of purposes, the disclosure authority should (i) specify the statement of the purpose for disclosure in substantial detail; (ii) describe the information authorized to be disclosed as clearly as feasible, perhaps in part by range or type, and perhaps with specified exclusions from the disclosure authority of any information that will clearly not be needed; and (iii) be subject to a proviso that no more information should ever be disclosed in any particular instance than is necessary to accomplish the specified purpose.

Examples can be found in the Internal Revenue Code, in Treasury Department regulations, and in recommendations by the Conference of disclosure authority provisions that display some features of the strategy outlined above. The one feature that is novel, and that should be included as a provision of overriding general applicability to all tax return disclosure authority, is the proviso that in any particular instance of authorized disclosure, no more information should be disclosed than is needed to accomplish fairly, effectively, and efficiently the purpose for which disclosure is to be made. The policy objective of this proviso is the same as that reflected by the provision of the Privacy Act of 1974 which seeks to limit Federal agencies to having only such information about an individual as is "relevant and necessary to accomplish a purpose of the agency. . . ."

Application of the proviso can effectively be achieved by requiring the establishment of administrative procedures designed to assure that a sufficient showing will be available to the Internal Revenue Service whereby it can be held accountable for determining that whatever information it discloses, pursuant to authority that is subject to the proviso, is limited to that which is genuinely necessary to accomplish the purpose for which disclosure is being made.

REPORT IN SUPPORT OF RECOMMENDATION 76-1

(As published in: Duke Law Journal, Vol. 1976, No. 2)

PRESIDENTIAL EXEMPTION FROM MANDATORY RETIREMENT OF MEMBERS OF THE INDEPENDENT REGULATORY COMMISSIONS

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The Civil Service Retirement Act[1] subjects federal employees to mandatory retirement, ordinarily at age seventy, and grants the President broad discretionary power to exempt employees from mandatory retirement by executive order.[2] The Act applies to great numbers of lower level employees, and to members of the independent regulatory commissions as well. Yet independent commissioners, unlike most federal employees, are appointed by the President under statutes which specify a term of service and make no reference to retirement.[3] Consequently, the appointment of a commissioner nearing retirement age raises questions concerning which statute should govern his tenure.

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

W. CARY, POLITICS AND THE REGULATORY AGENCIES (1967) [hereinafter cited as CARY];

H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES, THE NEED FOR BETTER DEFINITION OF STANDARDS (1962) [hereinafter cited as FRIENDLY];

Dixon, *The Independent Commissions and Political Responsibility*, 27 AD. L. REV. 1 (1975) [hereinafter cited as Dixon].

[1] 5 U.S.C. §§ 8331 *et seq.* (1970).

[2] *Id.* § 8335:

> Mandatory separation
>
> (a) Except as otherwise provided by this section, an employee who becomes 70 years of age and completes 15 years of service shall be automatically separated from the service.
>
> . . . .
>
> (c) The President, by Executive order, may exempt an employee from automatic separation under this section when in his judgment the public interest so requires.
>
> (d) The automatic separation provisions of this section do not apply to—
>
> (1) an individual named by a statute providing for the continuance of the individual in the service;
>
> (2) a Member;
>
> (3) a Congressional employee; or
>
> (4) an employee in the judicial branch appointed to hold office for a definite term of years.

[3] *See, e.g.*, 15 U.S.C. § 41 (1970) (FTC); 49 U.S.C. § 11 (1970) (ICC).

Although the current practice is to subject independent commissioners to mandatory retirement despite their statutory terms, and thus to permit the President to decide whether to grant an exemption,[4] its legality—and its wisdom—are open to question. The practice may unduly invade a fundamental statutory policy favoring commission independence by giving the President excessive control over the tenure of aged commissioners. Consider the potential for presidential influence over a commissioner hoping for an exemption, or possessing an exemption of indefinite duration which is presumably subject to revocation at the will of the President. In this regard, it is important to distinguish retirement exemptions from reappointment, since no one would challenge the existence of absolute presidential discretion in the reappointment decision. The approach of a reappointment decision certainly carries potential for White House influence, but that cannot be avoided as long as reappointments are permitted. And if a commissioner is reappointed, it is for a substantial period.

Furthermore, regardless of the merits of the exemption power, it is arguable that independent commissioners should not be subject to mandatory retirement at all. For example, one goal of long terms for independent commissioners is to promote the development of expertise; the separation requirement takes effect as the experience of a particular commissioner reaches its maximum.[5]

This Article examines the appropriateness of applying the mandatory retirement and presidential exemption provisions[6] to members of the independent regulatory agencies.[7] Although there has never been a definitive judicial resolution of the question whether statutes setting the terms of independent commissioners should be read as implied exceptions to the Retirement Act, the legislative history of the Act and Supreme Court decisions in the analogous area of presidential removal of independent commissioners suggest the appropriateness of such a reading. The discussion begins with a survey of the past use of the exemption power in order to illustrate the characteristics of the practice and the potential for abuse that flows from it.

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[4] See text accompanying notes 8-23 *infra*.

[5] Of course, arguments based on accumulated expertise can be made against mandatory retirement for anyone. For some special considerations relevant to the commissioners, see text accompanying notes 92-95 *infra*.

[6] For all employees except presidential appointees, the exemption authority has been delegated to the Civil Service Commission. Exec. Order No. 10,530, 3 C.F.R. 189 (1954-58 comp.); Exec. Order No. 10,682, 3 C.F.R. 331 (1954-58 comp.). See text accompanying notes 24-42 *infra*.

[7] Analysis focuses on members of the major independent regulatory commissions (ICC, FTC, FPC, SEC, CAB, FCC, NLRB), the Civil Service Commission, and the Tax Court. The Civil Service Commission is included because of its own role in retirement and exemption functions. The Tax Court is included because its members received a number of early retirement exemptions, see Table 1 in the Appendix, and because it provides an interesting institutional comparison to the regulatory commissions. See text accompanying note 17 *infra*. The Act of August 7, 1953, ch. 352, § 1106, 67 Stat. 482, created a separate retirement system for Tax Court judges, and explicitly ended the applicability to them of the mandatory separation provisions of the Civil Service Retirement Act. *See* S. REP. No. 675, 83d Cong., 1st Sess. (1953). The statute has been codified at 26 U.S.C. § 7447 (1970).

I. EXERCISE OF THE EXEMPTION POWER

A. *Presidential Appointees*

The President's power under the Retirement Act to exempt federal employees from mandatory retirement dates from 1932.[8] Although the exemption authority for most employees has been delegated to the Civil Service Commission, the President still controls exemptions for all presidential appointees.[9]

Members of the independent commissions became subject to the Retirement Act in 1946.[10] An examination of the executive orders issued since that date reveals several distinct characteristics of the exemption practice.[11] First, the total number of exemptions is rather low. Nearly thirty years have seen only twenty-nine exemptions for members of the major commissions and Tax Court judges, and twenty-five for other employees.

In addition, presidential usage of the exemption power has varied substantially. Most of the exemptions of independent commissioners and Tax Court judges occurred in a short burst of activity under President Truman, in the years following the extension of the Retirement Act to these employees. These exemptions can be explained, at least in part, as responses to a need to avoid excessive turnover in the agencies as the statute first took effect. President Eisenhower issued only one executive order regarding an exemption, and that was to convert President Truman's indefinite extension for the Organist and Choirmaster at the Military Academy into one expiring within three months.[12] President Eisenhower is said to have firmly held the view that no retirement exemptions should be granted;[13] the presence of his single executive order terminating one bears this out. There has been no other executive order by any President shortening or revoking an exemption.[14] The next President to demonstrate a practice of exempting independent commissioners was President Nixon, who granted five exemptions, three of them to FTC Commissioner A. Everette MacIntyre. President Ford has exempted two commissioners. The presence of seven exemptions granted by two Presidents in the last five years constitutes a re-emergence of the practice which warrants consideration of its institutional implications.

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[8] Act of June 30, 1932, ch. 314, § 204, 47 Stat. 404. See note 51 *infra*.

[9] See note 6 *supra*.

[10] See text accompanying notes 50-59 *infra*.

[11] Tables 1 and 2, found in the Appendix of this Article, summarize the executive orders issued since members of the independent commissions became subject to the Retirement Act in 1946. Table 1 collects exemptions of members of the major regulatory commissions, the Civil Service Commission, and the Tax Court. See note 7 *supra*. Table 2 gives the titles of all other employees exempted by Executive Order from 1946 to date.

The contents of the Executive Orders have varied little over the years. The orders issued immediately following the extension of the Retirement Act in 1946 recite that the Act is just becoming applicable to the officers involved. Exec. Order No. 9780, 11 Fed. Reg. 10,645 (1946); Exec. Order No. 9895, 12 Fed. Reg. 6493 (1947). The orders routinely invoke their underlying statutory authority, and simply parallel the statute, 5 U.S.C. § 8335(c) (1970), by reciting that "in my judgment, the public interest requires" that the person be exempted. The sole exception to the otherwise uniform practice of declining to elaborate individualized reasons for an exemption occurred in the case of President Truman's personal secretary. President Nixon included some fulsome rhetoric on her indispensability, presumably for scrapbook purposes. *See* Exec. Order No. 11,619, 3 C.F.R. 208 (1971 comp.).

One major change in the practice seems to have occurred over time. Most of President Truman's exemptions were for an indefinite period, not to extend beyond the recipient's current term of office. Some of these orders even contemplated the possibility of an entire new term for the commissioner, yet did not commit the President to an extension for the duration.[15] Presidents Nixon and Ford, on the other hand, have set time limits on their exemptions, although this has not prevented repeat exemptions as in the cases of FTC Commissioner MacIntyre (three) and CAB Commissioner Whitney Gillilland (two). The change is thus from indefinite extensions to relatively short-term ones, most of them for about a year, and with an apparent possibility of renewal. Either practice, however, makes the affected commissioner seem subject to White House bidding, an untoward effect which could be reduced simply by instituting a tradition that all exemptions be for the remainder of the commissioner's term, or for a definite period not subject to extension.[16]

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[12] Exec. Order No. 10,569, 3 C.F.R. 209 (1954-58 comp.).

[13] Interview with Rosel H. Hyde, former Commissioner, FCC, in Washington, D.C., July 24, 1975. See note 22 *infra* and accompanying text for one minor exception to this policy.

[14] Although no individual's exemption has been revoked, an order granting mass exemptions was later terminated. See note 20 *infra* and accompanying text.

[15] *Compare* Exec. Order No. 9963, 13 Fed. Reg. 2943 (1948), *and* Exec. Order No. 10,034, 3 C.F.R. 227 (1949-53 comp.) (granting indefinite extensions not to exceed new term), *with* Exec. Order No. 10,255, 3 C.F.R. 760 (1949-53 comp.) (exempting FPC Commissioner Claude L. Draper for full new term).

The early exemptions under President Truman demonstrate other troubling institutional characteristics. First, his use of the exemption for judges of the Tax Court seems particularly inappropriate, since their primary responsibility is to adjudicate, and unlike the independent commissioners, they do not have other major policy-making responsibilities which might justify exempting a "key" individual. Although Tax Court judges now have a separate retirement system not subject to the exemption power,[17] the precedent remains a troubling one for those agencies with substantial adjudicative duties. Second, the presence on an agency of several exempted members at one time increases the possibility for White House influence. Thus, for a time in 1949, three of four FTC commissioners[18] and five of sixteen Tax Court judges were under exemption.[19]

Finally, one use of the exemption power suggests a possible means of avoiding the institutional difficulties of individualized determinations. This is the blanket exemption. In two separate instances involving special circumstances, Presidents have issued broad executive orders exempting groups to whom the statute applied. The first, by President Roosevelt, exempted all presidential appointees for an indefinite period not extending beyond their current term of service, in order to avoid losing the services of a great many officers to whom the Retirement Act was just becoming applicable.[20] The second blanket exemption extended the terms of presidential appointees reaching the retirement age for a period of some months to allow the statutory amendments of 1956[21] to govern their retirements.[22] Thus, perhaps the President could issue an order exempting all members of the independent commissions from retirement for the duration of their then current terms.[23]

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[16] The latter suggestion would allow for retention of a commissioner to fill a need for his expertise on a particular matter. For example, ICC Commissioner Kenneth H. Tuggle was exempted from retirement to help complete the Northeast railroad reorganization. *See* Washington Post, July 20, 1975, at G4, col. 1. A useful comparison to this suggested procedure is provided by the practice of the Civil Service Commission in restricting the duration and renewal of the exemptions it controls. See text accompanying notes 24-31 *infra.* Ample security of tenure should result under either scheme suggested in the text since it is unlikely that the President could revoke an exemption for a set period without establishing the necessary grounds for the commissioner's removal. *See* Wiener v. United States, 357 U.S. 349 (1958); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935). Limitations on the removal power are discussed in detail in the text accompanying notes 67-88 *infra. See also* Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973). Even an indefinite exemption may provide some practical security. During the early part of the Eisenhower administration, both ICC Commissioner J. Monroe Johnson and FCC Commissioner Paul Walker were on indefinite extensions granted by President Truman. Assistant to the President Sherman Adams raised the question of revoking both exemptions, presumably to replace the men with persons more congenial to the new administration. Interview with Frederick W. Ford, former Chairman, FCC, in Washington, D.C., July 24, 1975. The idea was dropped, however, apparently at least in part because of doubts whether even an indefinite extension could be revoked without cause. *Id.* Again, the analogy would be to the removal cases. The only executive order to date which terminates an exemption is the one issued by President Eisenhower shortening the indefinite extension for the Organist and Choirmaster at the United States Military Academy. Exec. Order No. 10,569, 3 C.F.R. 209 (1954-58 comp.).

[17] See note 7 *supra.*

[18] *Compare* 45 F.T.C. II (1950) *with* Table 1 in the Appendix.

[19] *Compare* 13 T.C. III (1950) *with* Table 1 in the Appendix.

B. *Federal Employees Other Than Presidential Appointees*

For all employees except presidential appointees, the Civil Service Commission controls exemptions from mandatory retirement.[24] Pursuant to its delegated authority, the Commission has promulgated a comprehensive rule controlling the exercise of the exemption power.[25] The rule contains a special provision restricting the use of the power in the case of administrative law judges,[26] which is apparently designed to protect the judges' independence from their employing agencies. Comparison of the Commission's controlled procedures for exemption with the President's uncontrolled exemption power is illuminating. Analogy to the President's power in this regard is provided by a statutory provision granting agencies broad discretion to reemploy retired persons instead of seeking retirement exemptions for them.[27]

The Commission's exemption regulations state that an agency desiring to exempt an employee shall submit a recommendation to that effect to the Commission.[28] For employees other than administrative law judges, the recommendation filed by the agency head is to contain a statement that the employee is willing to remain in service, a recital of facts showing that retention would be in the public interest, the period for which exemption is desired (which may not exceed one year), and the reasons why the simpler method of retiring the employee and immediately reemploying him is not being used.[29] Recommendations are to be accompanied by a medical certificate showing the physical fitness of the person to continue.[30] The Commission will approve an exemption only prior to the automatic separation date applicable to the employee.[31] As the regulation suggests, this power is not invoked often; the agencies simply reemploy annuitants instead.

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[20] Exec. Order No. 9047, 3 C.F.R. 1084 (1938-43 comp.), *revoked*, Exec. Order No. 10,512, 3 C.F.R. 179 (1954-58 comp.).

[21] Act of July 31, 1956, ch. 804, § 401, 70 Stat. 743.

[22] Exec. Order No. 10,674, 3 C.F.R. 327 (1954-58 comp.).

[23] 5 U.S.C. § 8335(c) (1970). This section, however, is now phrased in the singular ("may exempt an employee"), suggesting that individualized determinations must be made. As recently as the 1956 amendments, the statute referred to exemption of "any" employee, perhaps a plural term. Act of July 31, 1956, ch. 804, § 401, 70 Stat. 748. The change in phraseology occurred in the 1966 codification of title 5, and appears to have been without intentional substantive significance. Act of Sept. 6, 1966, Pub. L. No. 89-554, § 8335, 80 Stat. 571; *see* H.R. REP. No. 901, 89th Cong., 1st Sess. 3, 160 (1965).

[24] See note 6 *supra*.

[25] 5 C.F.R. § 831.503 (1975).

[26] *Id.* § 831.503(b)(2).

[27] 5 U.S.C. § 3323(b) (1970). *See also* FEDERAL PERSONNEL MANUAL 300-17, subch. 7 (1969); FEDERAL PERSONNEL MANUAL SUPP. 831-1, subch. S15 (1973).

For administrative law judges,[32] the recital of facts showing that retention is in the public interest is to include a showing that the judge is responsible for a previously assigned case or cases that are unfinished because of circumstances that could not have been foreseen at the time of assignment. The period of exemption is not to exceed the lesser of a year or sufficient time to complete the pending cases, and the Commission will grant each judge only a single exemption.[33] Since these more stringent limits seem designed to protect the judges' independence from their employing agencies, the Commission's policy is relevant in examining the exemption of independent commissioners from mandatory retirement, at least insofar as the latter exercise adjudicative functions, and in a broader sense to the full extent that the commissioners are meant to be independent of White House influence.

The most important controls in the Civil Service regulation are the time limits, the rule against repeat exemptions, and the requirement for a specific showing of unusual circumstances that justify the exemption. These kinds of controls could provide an appropriate check on presidential discretion in exemption decisions. It seems unlikely, however, that substantial limits upon the discretion of the President or an agency will result from requirements for general recitals of the need to retain an employee, or for medical certificates of fitness to serve.

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28. 5 C.F.R. § 831.503 (1975).

29. *Id.* § 831.503(b)(1).

30. *Id.* § 831.503(3).

31. This provision responds to 37 Op. Att'y Gen. 393 (1936), stating that the President had no authority to issue a proposed executive order exempting a customs employee, since the effective date of retirement had passed.

32. 5 C.F.R. § 831.503(b)(2) (1975). The regulation uses the superseded term "hearing examiner" for these officers, who are appointed pursuant to 5 U.S.C. § 3105 (1970). *See* 37 Fed. Reg. 16,787 (1972).

33. 5 C.F.R. § 831.503(b)(2) (1975).

The more frequently employed practice of reemployment is governed by the provision stating that "an annuitant . . . is not barred by reason of his retired status from employment in an appointive position for which he is qualified. An annuitant so reemployed serves at the will of the appointing authority."[34] The employing agency, not the Civil Service Commission, makes the decision to reemploy an annuitant[35] and then notifies the Commission of its action.[36] The *Federal Personnel Manual* provides that no special appointing authority is needed for reemployment because it is done under general grants of authority.[37] According to the *Manual*, the provision of section 3323 (b) stating that an annuitant serves at the will of the appointing authority means just that: "a reemployed annuitant may be separated at any time at the discretion of the appointing officer, regardless of type of appointment."[38]

In only one case has an exercise of the reemployment power been challenged. In *Gamble-Skogmo, Inc. v. FTC*,[39] the hearing examiner in an FTC proceeding reached the date of mandatory separation after submission of the case to him, but before he had made his findings, conclusions, and recommended decision. The FTC reemployed him for two intervals amounting to forty-five days, but then allowed his employment to expire, whereupon another hearing examiner made findings and conclusions on the existing record. This was attacked as arbitrary and as a violation of due process. On review of the order the FTC issued in the case, the Eighth Circuit thought that the Commission's decision not to continue the hearing examiner's employment was within its complete discretion and not subject to judicial review.[40] The court was not persuaded by the Administrative Procedure Act's provision that the officer who receives evidence shall make the recommended decision unless he becomes unavailable to the agency,[41] and would not read the APA to condition the Retirement Act by imposing any duty on the agency to reemploy a retired employee,[42] or to seek his exemption. Unfortunately, the opinion in *Gamble-Skogmo* is not an aid to analysis. The court's wooden approach is typified by its refusal to attempt an accommodation of the policies of the two statutes through recognition of a limited duty on the part of an agency either to retain its hearing examiner during the disposition of a case, or to explain why it will not do so.

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[34] 5 U.S.C. § 3323(b) (1970).

[35] FEDERAL PERSONNEL MANUAL 300-17, subch. 7 (1969); FEDERAL PERSONNEL MANUAL SUPP. 831-1, subch. S15 (1973).

[36] *Id.* subch. S15-2 (1973), S15-7 (1974). The Commission will not approve reemployment of administrative law judges in order to protect the judges' independence from their employing agencies. *See* Minute 1 of the Minutes of the Civil Service Commission for December 23, 1968.

[37] FEDERAL PERSONNEL MANUAL 300-17, subch. 7-3a (1969).

[38] *Id.* subch. 7-3b.

[39] 211 F.2d 106 (8th Cir. 1954).

[40] The court was interpreting an earlier version of the reemployment statute which did not allow reemployment "unless the appointing authority determines that he is possessed of special qualifications." *Id.* at 111.

[41] 5 U.S.C. § 554(d) (1970).

The facts of *Gamble-Skogmo* suggest a potential problem in the retirement of independent commissioners. If a commissioner reaches the mandatory separation age during agency consideration of an important case, the President's decision whether to grant an exemption will not seem divorced from its impact on the case. Appearances will not be aided by the practice of offering no reasons for the grant or denial of an exemption, and it seems most unlikely that a court would attempt to impose any requirements for presidential explanation. The solution is to remove the occasion for such an unseemly exercise of discretion by a statutory amendment resolving the issue of the commissioner's tenure in advance.

II. APPLICATION OF THE RETIREMENT ACT PROVISIONS TO INDEPENDENT COMMISSIONERS

Only once has the legality of applying the President's exemption power to independent commissioners been challenged in an adjudicatory proceeding.[43] Consumer groups attempting to intervene in an FTC proceeding challenged Commissioner MacIntyre, then under exemption from retirement, arguing that the exemption statute should not be read to apply to independent commissioners because of its fundamental inconsistency with the intended independence of the commissions.[44] The consumers also invoked the due process cases on interest of an adjudicatory officer,[45] arguing that Commissioner MacIntyre regarded himself as serving essentially at the pleasure of the President, a presumed status that infected his decisions with considerations of personal gain or loss. The consumers further argued that even if section 8335 applied to commissioners, it should not be read to authorize short-term, renewable exemptions, which maximize a President's possible influence over a commissioner. Instead, the officers' statutory terms and the Retirement Act should be read together to minimize policy conflict by requiring that exemption, if granted, be for the remainder of a term.

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[42] 211 F.2d at 112. The court held, however, that when credibility determinations are important, the decision should be made by the officer who conducted the hearing; it remanded the case for further proceedings.

[43] ITT Continental Baking Co., 82 F.T.C. 1188 (1973).

[44] *See* Renewed Motion of Consumers Federation of America, Consumers Union of the United States, Inc., and Federation of Homemakers, Inc., to Intervene as Parties; and Motion Requesting Disqualification of Commissioner MacIntyre from Participation in this Proceeding, ITT Continental Baking Co. (F.T.C., filed Mar. 29, 1973); Memorandum to the Commission in Support of Renewed Motion, ITT Continental Baking Co. (F.T.C., filed Mar. 29, 1973).

[45] *See generally* Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). This constitutional argument proves too much, since the federal executive branch is replete with adjudications finally decided by officers without secure tenure. Rejection of a constitu-

Commissioner MacIntyre refused to disqualify himself.[46] He denied any undue influence from the White House, and appended a 1969 memorandum for the White House staff regarding contacts with the independent agencies,[47] which observed that the commissioners had "quasi-judicial responsibilities" for individual cases, and that, obviously, interference in this function would be highly improper. The consumer groups responded that Commissioner MacIntyre's answer failed to address the primary issue raised by their motion.[48] They had not suggested the existence of specific attempts to influence the Commissioner, but had simply argued that one cannot assume that an officer, no matter how great his personal integrity, can remain unaffected by the fact that his continued service is within the discretion of the President. It was, the consumers urged, to prevent this actual or apparent prejudice that Congress made the commissions independent. The Commission responded with an unexplained order denying the motion for disqualification.[49]

Thus, in the only case involving a challenge to the legality of the exemption power as it applies to independent commissioners, the tribunal involved failed to address the central issue, the potential for undue presidential influence over a member of an independent agency. As the following analysis will show, the conclusion that it is inappropriate to apply the mandatory retirement and exemption provisions of the Retirement Act to members of independent commissions is not pre-

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tional argument based on the interest cases, of course, does not prejudice arguments based on statutory policy that the situation in which Commissioner MacIntyre found himself should be avoided.

[46] ITT Continental Baking Co., 82 F.T.C. 1188 (1973).

[47] *Id.* at 1191.

[48] Comments on Commissioner MacIntyre's Response to Amici's Motion for Disqualification, ITT Continental Baking Co. (F.T.C., filed Apr. 9, 1973).

[49] ITT Continental Baking Co., 82 F.T.C. 1188, 1194-95 (1973). Commissioner Mary Gardiner Jones filed a separate statement. She thought it a serious issue whether Commissioner MacIntyre's status was governed by the Retirement Act or his statutory term, and bemoaned the status of a Commissioner serving after age seventy under circumstances of legal uncertainty. *Id.* at 1192-94.

cluded by the legislative history of the Act and is supported by case law in the analogous area of presidential removal of independent commissioners.

A. *Legislative History and Analysis*

The original Civil Service Retirement Act, passed in 1920, did not apply to presidential appointees.[50] The President's power to exempt covered employees from mandatory retirement dates from 1932.[51] The first extension of the Retirement Act to include members of the independent commissions occurred in 1942 when, by the Act of January 24, 1942,[52] Congress expanded the application of the Act in an all-inclusive fashion: "This Act shall apply to all officers and employees in or under the executive, judicial, and legislative branches of the United States Government, all elective and appointive officers in or under the said branches . . . ." A major purpose in so extending the Act was to provide retirement benefits for the members of Congress themselves.[53] A storm of public protest ensued, blasting the Congress for lining its own pockets in times of national peril. With unusual alacrity, Congress responded with the Act of March 7, 1942,[54] which added "except elective officers and heads of executive departments" to the above language in the January statute. It is clear that by this language Congress meant to exclude members of the independent commissions from the Retirement Act;[55] its reasons for doing so, however, are more obscure. Most of the legislative history of the March amendment is directed to the political advisability of excluding Congressmen from the retirement system,[56] and an excess of caution may account for exclusion of the Cabinet and agency heads as well.[57]

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[50] Act of May 22, 1920, ch. 195, § 1, 41 Stat. 614. The Act applied only to employees in the classified civil service, which did not include presidential appointees. *See* 34 Op. Att'y Gen. 334, 337 (1924). The Act also contained a specific exception for presidential appointees in certain named agencies whose employees were otherwise specifically included within the Act's coverage, such as the Library of Congress. *See* Act of May 22, 1920, ch. 195, § 1, 41 Stat. 614. This explicit exception was later dropped from the statute without legislative explanation, *see* Act of July 3, 1926, ch. 801, § 3, 44 Stat. 904, but for the probable reason that it was superfluous.

[51] Act of June 30, 1932, ch. 314, § 204, 47 Stat. 404. The original language of the exemption was substantially similar to its present form: "The President may, by Executive Order, exempt from the provisions of this section any person when, in his judgment, the public interest so requires . . . ." See note 2 *supra* (text of current statute). The first exercise of the power was immediate. *See* Exec. Order No. 5872, 2 Proclamations and Executive Orders: Herbert Hoover 1218-20 (G.P.O. 1974) (dated June 30, 1932).

[52] Ch. 16, § 3, 56 Stat. 15. President Roosevelt soon issued Exec. Order No. 9047, 3 C.F.R. 1084 (1938-43 comp.), exempting for an indefinite period not to exceed their current term of office "[a]ll officers and employees in the Executive branch" appointed by the President.

[53] *See* 88 Cong. Rec. 456-63, 515-17, 1578-79 (1942).

[54] Ch. 166, § 16(c), 56 Stat. 147.

[55] Ch. 166, § 1(d), 56 Stat. 143. The statute defines "department" as "any executive department, independent establishment, or agency (including corporations) in

In 1946, Congress again reversed itself and explicitly extended the Retirement Act to commissioners of the independent agencies. The statute was short and simple;[58] its stated purpose was simply "to include the heads of executive departments and independent agencies within the purview of the Civil Service Retirement Act . . . ."[59]

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the executive branch . . . ." At the time of the bill's passage, the House and Senate conferees pointed out this language and named several of the major independent agencies as examples of those included within the definition. 88 CONG. REC. 1727-29, 1824 (1942).

[56] *See Hearings on S. 2242, S. 2247, and S. 2284 Before the Comm. on Civil Service*, 77th Cong., 2d Sess. (1942); *Hearings on H.R. 6471 Before the Comm. on Civil Service*, 77th Cong., 2d Sess. (1942); 88 CONG. REC. 947, 1386-90, 1440-42, 1462-69, 1576-85, 1725-30, 1822-24 (1942).

[57] The debates indicate some concern for the need to remove as many "high-salaried executives," 88 CONG. REC. 1576 (1942), and "political appointees," *id.* at 1577, as possible. The amendment was tacked onto unrelated legislation to speed passage. There is an indication that the conferees went as far toward outright repeal of the January statute as parliamentary rules would allow. *Id.* at 1729, 1824.

[58] Act of July 24, 1946, ch. 612, 60 Stat. 659:

> AN ACT
>
> To include the heads of executive departments and independent agencies within the purview of the Civil Service Retirement Act of May 29, 1930.
>
> *Be it enacted* . . . [t]hat section 3(a) of the Civil Service Retirement Act of May 29, 1930, as amended, is amended by striking out the words "and heads of executive departments".
>
> Sec. 2. . . . As used in this section the term "department" means any department, independent establishment, or agency (including corporations) in the executive branch of the Government.

[59] *Id.* The present form of section 8335 of the Retirement Act, the mandatory retirement provision, derives from the Act of July 31, 1956, ch. 804, § 401, 70 Stat. 748. The 1956 statute applied generally to any "employee," a term defined as "a civilian officer or employee in or under the Government. . . ." Ch. 804, § 401, 70 Stat. 743. Upon the codification of title 5 in 1966, a generic definition of the term "employee" was attempted in section 2105(a). *See* Act of Sept. 6, 1966, Pub. L. No. 89-554, § 2105, 80 Stat. 409. The Act provides:

> Employee
>
> (a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—
>
> (1) appointed in the civil service by one of the following acting in an official capacity—
>
> (A) the President;
>
> (B) a Member or Members of Congress, or the Congress;
>
> (C) a member of a uniformed service;
>
> (D) an individual who is an employee under this section; or
>
> (E) the head of a Government controlled corporation;
>
> (2) engaged in the performance of a Federal function under au-

The legislative history of the bill is rather scant. The House Report[60] simply stated the purpose of the statute in the terms of its heading, and incorporated a letter from Civil Service Commission President Harry B. Mitchell for elaboration. In the letter, Mitchell said the proposed statute would deal with only about ninety of two million federal employees, and that even some of these were already covered because the appointees had previously been in qualifying positions. Mitchell remarked that the Tax Court had the largest number of employees not currently "protected" by a retirement system and that "[t]here seems no reason why they should be discriminated against." ICC and FCC commissioners would also be affected. Since some employees in these positions already had retirement rights, he concluded, the bill sought "to correct the inequality."[61]

Discussion of the bill in the House largely paralleled the thrust of the letter.[62] Representative Jennings Randolph, Chairman of the House Committee on the Civil Service, said the bill had the unanimous

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> thority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

The statute is substantially the same today, *see* 5 U.S.C. § 2105 (1970), and the Retirement Act has since referred to this provision for its principal delineation of coverage, with some modifications not relevant here. *See* 5 U.S.C. § 8331(1) (1970).

The committee reports accompanying the original codification explain that the purpose of section 2105(a) is "to avoid the necessity of defining 'employee' each time it appears in this title. The subsection is based on a definition worked out independently by the Civil Service Commission and the Department of Labor and in use by both for more than a decade." H.R. REP. No. 901, 89th Cong., 1st Sess. 27 (1965); S. REP. No. 1380, 89th Cong., 2d Sess. 47 (1966). A literal reading of the language of section 2105(a) would suggest that perhaps the definition of employee means to exclude members of the independent commissions, on grounds that they are not subject to the supervision of anyone while engaged in their duties. The question whether independent commissioners are properly regarded as subject to "supervision" by the President is a subtle one. See text accompanying notes 114-33 *infra*. Of course, the commissioners are subject to the President's supervision in at least the limited sense that he has the power to remove them for cause. See text accompanying notes 67-88 *infra*. In any event, it seems most unlikely that section 2105 was meant to have the effect of removing members of the independent agencies from the coverage of title 5. Any such reading would violate the stated purpose of the codification of title 5, which was to restate the existing law without substantive change. H.R. REP. No. 901, 89th Cong., 1st Sess. 1-3 (1965). It would also have multiple collateral consequences such as denying the commissioners retirement benefits. Furthermore, the inclusion of the detailed definition of employee is best understood as directed to the essentially unrelated problem of deciding when state employees engaged in federally funded programs should be regarded as federal employees. Stapleton v. Macy, 304 F.2d 954 (D.C. Cir. 1962).

[60] H.R. REP. No. 2429, 79th Cong., 2d Sess. (1946).

[61] *Id.* at 2.

[62] *See* 92 CONG. REC. 8254 (1946).

support of his panel, and recited the substance of the Mitchell letter. "This is remedial legislation," he said, remarking on the applicability of the statute to members of the Tax Court, the ICC, and the FCC.[63] Again the concern was with removing perceived discrimination against a few officials. After this momentary consideration, the House passed the statute.

In the Senate, the legislative history is even more sparse. The committee document simply indicated that the statute would apply to about ninety positions, some of them already held by employees covered by the Retirement Act, and gave the cost of the bill.[64] On the floor of the Senate, Senator Sheridan Downey briefly remarked that these were the only federal employees denied retirement benefits, and that the bill would merely grant them rights held by other federal workers.[65]

Congressional attention in passing the statute thus seems to have focused exclusively upon the benefits to agency heads from extending coverage to them. There is no recorded consideration of whether the mandatory separation requirement should apply to the independent agencies, and no consideration of the implications of the presidential exemption power. The first application of that exemption power to independent commissioners occurred immediately thereafter, however.[66]

B. *The Presidential Removal Power: Application of the Case Law to Exemptions from Retirement*

The President's power to grant or deny retirement exemptions is functionally similar to his power to remove commissioners from office. Accordingly, the policy reasons offered in the cases limiting the removal power, which emphasize a congressional desire to maintain agency independence, are applicable in the retirement context as well. The removal cases thus illustrate the reasons why members of independent commissions should not be held subject to the mandatory retirement provision while the President retains the discretionary power to exempt them from retirement.

The first test of the President's removal power occurred in 1926 in *Myers v. United States*.[67] Frank Myers, a postmaster, was appointed by the President and confirmed by the Senate under a statute which gave him a four-year term, unless he were sooner removed with the Senate's advice and consent. President Wilson dismissed Myers without asking for the Senate's approval. In a suit for Myers's salary, the Supreme Court held that the provision of the statute restricting the President's power of removal was unconstitutional. Chief Justice Taft's majority opinion relied on the provisions of article II of the Constitution that "[t]he executive Power shall be vested in a President," and that "he shall take Care that the Laws be faithfully executed."[68] The Chief Justice reasoned that the executive power is exclusively vested in the President, and that accordingly the agents of the executive must be exclusively responsible to him. In dictum, however, he did acknowledge a possible need to modify so simplistic a view of the separation of powers:

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[63] *Id.*

[64] S. REP. No. 1679, 79th Cong., 2d Sess. (1946).

[65] 92 CONG. REC. 9203 (1946) (remarks of Senator Downey).

[66] Exec. Order No. 9780, 11 Fed. Reg. 10,645 (1946).

[67] 272 U.S. 52 (1926).

> Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.[69]

Justices Holmes, McReynolds, and Brandeis dissented.[70]

This endorsement of very broad presidential discretion to remove officers was severely limited in *Humphrey's Executor v. United States*,[71] a case involving President Roosevelt's attempt to remove FTC Chairman William Humphrey, a Hoover nominee. Roosevelt prodded Humphrey to resign, advancing only grounds of policy differences.

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[68] U.S. CONST. art. II, §§ 1, 3.

[69] 272 U.S. at 135.

[70] *Id.* at 177, 178, 240. In the wake of *Myers*, the United States Attorney General was confronted with the argument that the Retirement Act constituted a legislative usurpation of the President's power to remove postmasters. 35 OP. ATT'Y GEN. 309 (1927). Observing that the question turned upon whether the Retirement Act operated to remove officers or merely to limit their terms of office, the Attorney General concluded that the Act performed the latter function, and thus was a legitimate exercise of congressional power. *Id.* at 312, 314.

[71] 295 U.S. 602 (1935).

Humphrey declined to resign, and Roosevelt removed him. In a subsequent suit for lost salary, the Court defined the issues as whether the provision in the Federal Trade Commission Act that a commissioner could be removed for "inefficiency, neglect of duty, or malfeasance in office"[72] meant to restrict the President's removal power to the causes stated, and whether such a restriction was constitutional. In a unanimous decision, the Supreme Court answered both questions in the affirmative.[73]

The legislative history of the FTCA indicates a desire to arrange the commissioners' terms of office so that the membership of the Commission will not be subject to complete change at any time, and a desire to make the terms long enough to give commissioners an opportunity to acquire expertise. Congress thought it essential that the Commission be independent, and not open to suspicion of partisanship, since its duties were "neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[74] The Court concluded:

> Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.[75]

Having decided that the statute limited the power of removal to the enumerated causes, the Court then considered the constitutional question. It began by disapproving the sweeping dictum of *Myers* insofar as it had gone beyond the decided point that the President could remove postmasters without congressional restriction. The Court characterized a postmaster as an executive officer with solely executive functions, and no legislative or judicial ones. *Myers* therefore went far enough to include "all purely executive officers,"[76] but no further. The Court characterized the FTC as divorced from the executive branch, created by Congress to carry its legislation into effect, and designed to be free from executive control. The authority of Congress to create such agencies, the Court thought, could not be doubted.[77] Limits upon the removal power were a necessary corollary since "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."[78]

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[72] 15 U.S.C. § 41 (1970).

[73] As a preliminary matter, the Court distinguished Shurtleff v. United States, 189 U.S. 311 (1903), in which the Court had refused to read similar language of removability to be exclusive, in light of the absence of any statutory term for the officer involved, an appraiser. 295 U.S. at 621-23. The Court in *Shurtleff* had thought it most unlikely that Congress intended life tenure for an executive officer in the absence of the most explicit language to that effect. 189 U.S. at 316, 318. In *Humphrey*, of course, there was a statutory term to limit the officer's tenure.

[74] 295 U.S. at 624.

[75] *Id.* at 625-26.

This sharp limitation of the sweeping approach of *Myers* was reaffirmed in the Court's most recent treatment of the removal issue in *Wiener v. United States.*[79] Congress had established the War Claims Commission to "adjudicate according to law" various claims arising from enemy action in World War II.[80] The Commission members were presidential appointees, and the Commission was to complete its task within three years, thus setting the tenure of the commissioners. There was no provision for their removal. Nevertheless, Commissioner Myron Wiener was removed by President Eisenhower, who asserted a need to complete the Commission's task "with personnel of my own selection."[81] In another suit for lost salary, Justice Frankfurter wrote for a unanimous Court. He was undaunted by congressional silence about removal. Because of the notoriety of the *Humphrey* case, he argued, Congress could not have been unaware of the problem of the President's removal power. Congress would also have been well aware that *Humphrey* drew a sharp line between officials within the executive branch, for whom the removal power could not be restricted, and members of a body designed to be independent, for whom the removal power would exist only if Congress conferred it. "This sharp differentiation derives from the difference in function between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference."[82] Justice Frankfurter thus concluded that the most reliable way to detect congressional intent regarding the removal power in this case was to examine the nature of the functions that Congress had vested in the Commission. The legislative history established that the Commission was formed as an adjudicating body with decisions unreviewable by the executive. If one must take it for granted that the statute precluded the President from influencing the Commission on a particular claim, it would follow a fortiori that Congress did not want the commissioners to fear "the Damocles' sword of removal by the President" for no other reason than that he preferred to have persons of his own choosing.[83] Wiener's removal was therefore illegal.[84]

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[76] *Id.* at 627-28.

[77] The Court thought that if Congress could not limit the removal power for the FTC, it would be hard to see any limit to the removal power except for the judiciary. No distinction could be made even with regard to the Court of Claims, a legislative court exercising judicial power. *Id.* at 629.

[78] *Id.*

[79] 357 U.S. 349 (1958).

[80] War Claims Act of 1948, 50 U.S.C. App. § 2001(d) (1970).

[81] 357 U.S. at 350.

The Supreme Court's approach in *Humphrey* and *Wiener* is very uncompromising. One might even fault the Court for naiveté in its view of the agencies as impartial bodies of experts enjoying "absolute" freedom from executive interference.[85] Its wariness of the removal power apparently stems from the view that officers having major adjudicative responsibilities must be independent of outside influence, and that independence can be guaranteed only through security of tenure. Although the Court could find specific legislative intent on this point in *Humphrey*, it had no difficulty in inferring such an intent simply from the functions assigned to the commissioners in *Wiener*.[86]

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[82] *Id.* at 353. Presumably, Justice Frankfurter did not mean to suggest that whether the officer is formally within the executive branch is determinative, as distinguished from the functions he performs. It is clear, for example, that Congress may guarantee the independence of administrative law judges in the executive branch. 5 U.S.C. § 7521 (1970); *see* Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953); *cf.* McEachern v. United States, 321 F.2d 31 (4th Cir. 1963).

[83] 357 U.S. at 356.

[84] One lower court opinion has dealt with the removal power. In Morgan v. TVA, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941), the court upheld the removal of a director of the TVA. The court could not find congressional intent to restrict the President, partially for the simple reason that the statute had been passed between *Myers* and *Humphrey*, in a period when Congress would have had the gravest doubts regarding its power to limit the President. The court thought that reading the TVA statutes to deny the President power to remove TVA directors would raise a constitutional question, even under *Humphrey*, on the possibility that a purely executive officer was being removed. To Morgan's contention that the TVA exercised quasi-legislative powers, destroying the President's illimitable power to remove its members, the court responded in dictum that the TVA exercised "predominantly" an executive or administrative function. The President enjoyed various statutory supervisory functions; moreover, the TVA's activities, which were for the most part managerial, were characteristic of a part of the executive branch. The court conceded that the directors had to enact bylaws, a legislative function, and to make decisions, which might be characterized as a judicial function. But this was no different from the duties of any other administrative officer. The court thought the TVA could not be compared to the regulatory commissions, which it characterized as mainly exercising quasi-legislative or quasi-judicial functions. The *Morgan* case thus illustrates the difficulty of neat separations of various positions in the Government by whether they are purely executive or not. *Cf.* Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973) (President's removal of Watergate Special Prosecutor Cox held illegal as violation of Department of Justice regulation having force of law).

[85] *See* 357 U.S. at 353; 295 U.S. at 625-26. See discussion at text accompanying notes 114-33 *infra.*

The cases do not shed a great deal of light on what does constitute sufficient cause for removal of a commissioner, since in the last two major cases cause was not even asserted. Perhaps one can stake out some limits, however. For instance, it seems clear that *Humphrey* not only restricts the applicability of *Myers*, but also rejects its theory of the appropriate limits upon removal of an officer having duties committed to his discretion, or engaged in adjudication. The *Myers* court had argued that although a President might lack the power to overrule an officer in a particular exercise of such functions, the President could still remove him for his action afterwards.[87] *Humphrey's* premise that a commissioner's security of tenure is vital to commission independence is inconsistent with any such definition of the cause sufficient for removal. Pressure on a commissioner to accede to the President's wishes is, of course, essentially the same whether removal occurs at the time of a decision, or after a decent interval.[88] This suggests that the only grounds for removal that the Court is likely to find to be within statutory contemplation are those clearly unrelated to the merits of a particular case, such as entertaining improper ex parte contacts, habitual inefficiency, or criminal violations. If this view of the removal power is accurate, presidential exercise of the exemption power should trouble the Court greatly. It provides an opportunity for what may be in substance just the kind of removal suggested by *Myers*—for example, refusing to exempt a commissioner who reaches mandatory retirement age a short interval after a particular decision—and condemned by the rationale of *Humphrey* and *Wiener*.

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[86] It is possible that even the members of the FCC, FPC and SEC, whose statutory terms do not include restrictions on removal, may receive protection under *Wiener*. CARY 10. Since these agencies were formed during the interim between *Myers* and *Humphrey*, it is difficult to make any argument in favor of actual legislative intent to restrict removal, since Congress probably would have thought that it did not have the power. *See* Morgan v. TVA, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941) (discussed in note 84 *supra*). But the Court might strain to detect such a congressional intent, as a corollary to a demonstrated intent that these agencies enjoy a degree of independence from executive control.

[87] 272 U.S. at 135. The passage referred to is quoted in text accompanying note 69 *supra*.

[88] *See* Wiener v. United States, 357 U.S. 349, 356 (1958).

The Supreme Court's rationale in *Humphrey* and *Wiener* thus raises the question whether the Court might hold that application of the mandatory retirement statute to independent commissioners in effect constitutes an illegal removal because of the presence of the President's discretionary exemption power. The conclusion would be that the statutes setting the terms of these officers, and not section 8335, should govern their tenure; the process would be one of identifying and accommodating the policies of the two statutes. It is appropriate to engage in such a process because there is no indication of specific congressional intent that section 8335 override the commissioners' statutory terms.[89] The mandatory retirement provision with its power of presidential exemption took essentially its present form in 1932,[90] well before the Retirement Act was first applied to independent commissioners. And neither in the abortive 1942 attempt to extend the Retirement Act to the agency heads, nor in the successful 1946 reconsideration, was there any attention to whether the mandatory separation section should apply. The dominant legislative intent was to qualify the commissioners for pensions, an objective not necessarily inconsistent with excepting them from mandatory retirement, since their terms provide a definite terminus to their employment.

Humphrey and *Wiener* made very clear what the Court considered to be the major policies behind statutory terms for commissioners; length and certainty of tenure were emphasized as vital guarantees of commission independence.[91] Application of the mandatory retirement and exemption provisions to the commissioners conflicts with this policy, because they grant the President discretion whether to continue the service of a commissioner at a time short of a full term. Furthermore, the practice followed to date of granting either indefinite or relatively short-term extensions exacerbates the problem.

The rationale of the removal cases also suggests that members of independent commissions should not be subject to mandatory retirement at all, regardless of the presence of the exemption power. Some of the policies underlying statutory terms identified by the Court in *Humphrey* and *Wiener* are plainly inconsistent with mandatory retirement. For instance, substantial terms favor the accumulation of expertise; mandatory retirement takes effect at a time when a commissioner's expertise is presumably at a maximum. Also, mandatory retirement tends to increase the number of vacancies on a commission, giving the

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[89] See text accompanying notes 50-66 *supra*.

[90] See note 51 *supra*.

[91] *See* 357 U.S. at 353; 295 U.S. at 626.

President the opportunity for short-term appointments to fill the unexpired portions of terms, with whatever threat to independence that poses.[92] Reducing the frequency of vacancies would also help to prevent the bunching of nomination opportunities for a given President, and would thus help to maintain the nonpartisan flavor that Congress intended for the commissions. (Restrictions in the statutes on the number of members of one party who may be appointed[93] are, of course, relatively little bar to a President hoping to appoint persons in philosophical sympathy with him.)

Hence, the removal cases reveal strong policy reasons in favor of reading the statutes that set the terms of commissioners to create implied exceptions to the mandatory retirement statute. Still other policy reasons have emerged in several cases involving challenges to mandatory retirement statutes in contexts apart from the regulatory commissions.[94] While a full discussion of the mandatory retirement cases is beyond the scope of this Article, they reveal some special considerations relevant to the appropriateness of subjecting independent commissioners to mandatory retirement.

The key argument against mandatory retirement per se is that it arbitrarily ignores differences between persons of the same age. Overbroad rules may be justifiable in dealing with huge numbers of employees,[95] but they become less so when applied to a discrete class more readily amenable to individualized consideration, as in the reappointment process. The arguments in favor of mandatory retirement, principally ease of administration and easier recruitment of young employees through the lure of faster advancement, are not as persuasive in regard to a limited number of political appointments at the commission level. One may hesitate before establishing routine competency hearings for employees reaching the age of retirement, upon a well-grounded fear that any such proceeding might be more demeaning than useful. But, for presidential appointees, an individualized judgment of a person's physical condition will routinely occur anyway at the time of reappointment. Of course, this becomes a more difficult judgment for commissions with relatively long statutory terms.

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[92] Excessive turnover on the commissions is a present problem. *See* Goodsell & Gayo, *Appointive Control of Federal Regulatory Commissions*, 23 AD. L. REV. 291, 291-92, 300-02 (1971) (observing that many commissioners do not serve full period of their terms).

[93] *See, e.g.*, 15 U.S.C. § 41 (1970) (FTC); 49 U.S.C. § 11 (1970) (ICC).

[94] *See* Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974), *aff'd*, 420 U.S. 940 (1975); Murgia v. Board of Retirement, 376 F. Supp. 753 (D. Mass. 1974), *prob. juris. noted*, 421 U.S. 974 (1975). These challenges have been based on the "irrebuttable presumption" doctrine which has developed over the past few years. The claim is that the irrebuttable presumption established by a mandatory retirement statute constitutes a denial of due process because the attainment of a particular age does not necessarily imply that an individual is no longer capable of adequately performing his job. *See generally* Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

[95] *See* Murgia v. Board of Retirement, 376 F. Supp. 753, 755-56 (D. Mass. 1974), *prob. juris. noted*, 421 U.S. 974 (1975).

The policy justifications for excepting independent commissioners from mandatory retirement altogether are persuasive. Although the legislative history of the Retirement Act does not reveal any express legislative intent contrary to such a conclusion, it could be argued that Congress impliedly ratified the application of the Act to commissioners when it reenacted present section 8335 with no explicit exception for them. But legislative attention never focused on the specific problem: the 1956 amendments,[96] which followed the most recent presidential exemption of an independent commissioner by over four years,[97] were broad in scope, and the 1966 codification involved all of title 5.[98] It is inadvisable to read such a record as conclusive of the applicability question.

III. APPOINTMENT PROCESS IN LIEU OF THE MANDATORY RETIREMENT AND EXEMPTION PROCESS

Since the appointment process contemplates an individualized determination of a person's competency to serve, it is not surprising that the argument has been raised that the presidential appointment and Senate confirmation of a commissioner nearing mandatory retirement age should be treated as an implied exemption from retirement. Indeed, perhaps an exemption should be implied whenever a commissioner reaches mandatory retirement age during his statutory term, on the premise that age was a consideration in the original appointment. As an examination of the two cases addressing the question illustrates, however, this is not the position that has prevailed to date.

The first case involved District of Columbia Commissioner Melvin C. Hazen,[99] who was appointed at age sixty-nine and reappointed at age seventy-two, in neither case with a formal executive order of exemption from retirement. In response to a claim by Hazen's executors for the return of monies paid into the retirement system, the right to which depended upon the legality of his employment, the Comptroller General concurred with the Civil Service Commission's opinion on referral that the employment after the separation date had been legal. The Comptroller General held that where "not long prior" to the time of mandatory retirement and again after that date the President took executive action to retain the officer by means of an appointment confirmed by the Senate, "no particular form of Executive order or action was required . . . ."[100] This reading of the Act of June 30, 1932,[101] the lineal predecessor of the current exemption statute, is strained to say the least: the statute said that "the President may, by Executive Order, exempt" an employee. The opinion may be seen as an understandable attempt to avoid the harsh consequence of penalizing the estate of an employee who was not responsible for the failure to produce a formal executive order, but it is a most unsatisfactory precedent. The operative language is hopelessly vague—no one can be sure when a reappointment has been "not long prior" to the age of separation.

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[96] Act of July 31, 1956, ch. 804, § 401, 70 Stat. 736.

[97] Exec. Order No. 10,330, 3 C.F.R. 855 (1949-53 comp.).

[98] Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378.

[99] 22 COMP. GEN. 52 (1942).

It is therefore not surprising that a correction was attempted in the next case to arise, that of ICC Commissioner William J. Patterson.[102] Commissioner Patterson turned seventy in June, 1950, and ordinarily would have been retired at the end of that month. He had been appointed in 1945 for a term to expire at the end of 1952; thus the case presented the issue of whether every reappointment should be viewed as an implied executive order of exemption for the period of the term. In Commissioner Patterson's case, the Chairman of the ICC had requested an executive order exempting him for the remainder of his term, but by the retirement date none had appeared.[103] After that date, however, Commissioner Patterson simply kept working, contending that he could stay until the expiration of his term.[104] Commissioner Patterson was claiming under the *Hazen* case,[105] or presumably under the removal cases.[106] In July, the ICC asked the Comptroller General whether it could continue to pay the Commissioner.

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[100] *Id.* at 54.

[101] Ch. 314, § 204, 47 Stat. 404 (quoted in pertinent part in note 51 *supra*).

[102] 30 COMP. GEN. 51 (1950).

[103] *Id.* at 52.

[104] Washington Post, Aug. 4, 1950, at 10, col. 7.

[105] In Commissioner Patterson's letter to the Comptroller General he cited the *Hazen* decision in support of his claim. 30 COMP. GEN. at 52.

[106] The removal cases are discussed in the text accompanying notes 67-98 *supra*. The argument under the removal cases would have been that the mandatory separation provisions of the Retirement Act were not meant to apply to independent commissioners, leaving the statutes setting their terms to govern.

The Comptroller General's opinion observed that the Civil Service Commission administers the Retirement Act; therefore the question whether an employee has reached a retirement status "primarily is a matter for consideration by the Civil Service Commission."[107] The Comptroller General pointed out that he had concurred with the Commission in *Hazen* because the first relevant appointment had been eight months prior to the retirement age and there had been a reappointment after age seventy. But in Patterson's case the reappointment was about five and a half years prior to separation, and no presidential action had occurred subsequent to the Commissioner's attaining the age of seventy. The Comptroller General suggested that the matter be submitted to the Civil Service Commission for a determination of Commissioner Patterson's status, but gave the pointed hint that "under the existing facts there appears to be no proper basis for certifying . . . compensation . . . ."[108] Two days later, the controversy was defused by the issuance of an executive order exempting the Commissioner for an indefinite period not to exceed his term of office.[109]

The opinions in *Hazen* and *Patterson* are fundamentally unsatisfactory. Read together, they suggest that a presidential appointment "not long prior" to the separation date, or occurring after it, constitutes an exemption that need not be ratified by executive order, but that not every appointment of a commissioner who will reach age seventy during his term qualifies. Even assuming that the statutes fixing the terms of commissioners should not be read as implied exemptions to the mandatory retirement statute, several other difficulties remain. First, one cannot predict at what point along the continuum between the two cases a person is reappointed "not long prior" to separation. Second, it is doubtful that the age of an individual is under contemplation by the President and the Senate when the commissioner is within perhaps a year of retirement, but not when the person will reach age seventy later in the term. Perhaps appointments of persons already over retirement age necessarily constitute implied retirement exemptions, however. Third, both cases seem to presuppose that the specific term "by Executive Order" in the exemption statute can be read to mean something other than what it says. Any such gloss seems impermissible in terms of the ordinarily exclusive meaning of "Executive Order," the otherwise consistent position of the Civil Service Commission that an executive order is required for exemption,[110] and the consistent presidential practice of issuing executive orders, a practice broken only by the apparently inadvertent omission in Commissioner Hazen's case. In three separate instances, President Truman reappointed a commissioner already under exemption, but he issued an executive order of exemption, not relying upon the reappointment and confirmation as sufficient.[111] Similarly, FTC Commissioner MacIntyre, who was last reappointed in 1968 within three years of the retirement age by President Johnson,[112] was later granted three separate extensions by President Nixon, who also chose not to rely upon reappointment alone.[113] In sum, it does not seem wise to approach the problems of reconciling statutory policy inherent in the retirement exemption question through an analysis focusing on a case-by-case search for the implied intent of the President and the Senate at the time of appointment.

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[107] 30 COMP. GEN. at 53.

[108] *Id.*

[109] Exec. Order No. 10,146, 3 C.F.R. 325 (1949-53 comp.). The exemption may have been illegal. It occurred after the retirement date and purported to be retroactive, despite an earlier Attorney General's opinion, see note 31 *supra*, that there was no authority to exempt once the retirement date had passed.

IV. Executive Control of the Regulatory Agencies

Since the principal question regarding the appropriateness of the President's exemption power under section 8335 is whether it fosters undue presidential control of the independent agencies, it is important to place that power in the context of the commonly understood boundaries of executive control. There are at least three major types of possible control.[114]

The first is the power to appoint and to remove commissioners. Clearly, appointments can strongly influence an agency's direction and vigor. Equally clearly, the President has a legitimate interest in reviewing commissioners' performance in office for reappointment purposes. Removal, however, has not proved a useful means of executive control of the agencies, if the absence of its exercise be any guide. Substantial doubts concerning what constitutes sufficient cause for removal probably deter frequent presidential use of the power. And removal is a politically hazardous step, especially if a commissioner has support in Congress.[115]

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[110] File, Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission, Washington, D.C.

[111] Exec. Order No. 9963, 3 C.F.R. 706 (1943-48 comp.); Exec. Order No. 10,034, 3 C.F.R. 227-28 (1949-53 comp.); Exec. Order No. 10,255, 3 C.F.R. 760 (1949-53 comp.).

[112] Interview with A.E. MacIntyre, former Commissioner, FTC, in Washington, D.C., July 22, 1975.

[113] Commissioner MacIntyre reports that the White House position was that the mandatory retirement statute applied to him, and that an executive order would be needed. *Id.* See Table 1 in the Appendix for the exemption sequence.

[114] Dixon (comprehensive review of these controls and others).

The second major means of executive control of the agencies is through the power of the Office of Management and Budget to control the budget and spending of the agencies and their requests for legislation.[116] The President also has the power to name the chairmen of the major independent commissions.[117] The chairmen, in turn, have important powers over agency personnel and spending.[118]

A third major method of executive control of the agencies is presidential direction of agency action. This method presents the subtlest issues of separation of powers, and most Presidents have not been quick to exercise it. There seems to be general agreement that the President has a legitimate role in reviewing the efficiency of the agencies, pursuant to his constitutional duty to see that the laws are faithfully executed.[119] That is, the President should be interested in the presence of undue agency delay in the dispatch of its business, and in whether the agency is engaged in setting policy pursuant to its mandate. The President's powers to revivify an agency include removing its commissioners for inefficiency, changing its chairman, and changing its budgetary and legislative requests to Congress.

The debate currently centers on whether the President should go beyond considerations of agency efficiency to policy guidance, and if he should direct the agencies on policy, whether he should do so only in a general or in a specific fashion.[120] One should note at the outset that it may be difficult as a practical matter to separate questions of efficiency from those of substantive policy, especially when an agency demonstrates indecision in the face of thorny problems. Advocates of increased executive control have emphasized a need to coordinate policy where the responsibilities of independent agencies overlap with one another and with the executive departments.[121] Enthusiasm for change should be tempered, however, with recognition that problems of coordination are not unknown within and among the executive departments already subject to full presidential control.[122] Since Presidents have little difficulty in making their policy views known, and since consensual policy coordination among the independent agencies can occur at present, the real problem is agency refusal to cooperate. The Administration can formally intervene in agency proceedings,[123] and if the agency does not concur, its reasons can be articulated. This sets the stage for Congress to resolve the dispute through legislation (or more subtle means such as appropriations) if it chooses. The question, then, is whether to shift the policy initiative from the agencies that presently possess it to the President.

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[115] *Cf.* CARY 10. It may be, however, that if a President removed a commissioner for asserted malfeasance, the Supreme Court would regard the issue as an unreviewable political question. *See* Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 CORNELL L.Q. 163 (1939); Rogers, *The Independent Regulatory Commissions*, 52 POL. SCI. Q. 1, 7-8 (1937).

[116] CARY 6-8, 11-12; Dixon 6-8; MacIntyre, *The Status of Regulatory Independence*, 29 FED. B.J. 1, 5-6 (1968).

[117] Dixon 8.

[118] Zamir, *Administrative Control of Administrative Action*, 57 CALIF. L. REV. 896, 898-99 & n.161 (1969).

[119] CARY 21; FRIENDLY 148-49; J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 32-33 (1960).

[120] *Compare* FRIENDLY 152-58 *with* CARY 20; Dixon 12-13, *and* Redford, *The President and the Regulatory Commissions*, 44 TEXAS L. REV. 288 (1965).

Arguments against increased executive control emphasize that policy guidance may not be significantly restrictive of agency discretion in application if it is at a broad level of generality, such as the need to reduce inflation or to increase competition,[124] and below this level of platitude there may not exist a well-articulated national policy that can be stated to the agencies and followed by them.[125] The net effect of executive control may therefore be simply to shift decisions from the agencies created to handle them into the White House.[126] Decisions there might be invisible to the public, and infected with considerations of partisan politics.[127] They would lack the contributions of the experienced agency staff and the benefits of full party participation as well.[128]

Those who would have the White House oversee both efficiency and the basic course of agency policy generally concede that it is improper for the White House to interfere in pending adjudications.[129] This poses a difficulty with capacity to give guidance in a meaningful fashion, given the propensity of agencies to set policy through adjudication. One might refine the limitation to allow guidance on legislative issues,[130] even those present in pending adjudications—for instance, a directive that competition be favored in licensing decisions.[131] It would remain improper to influence adjudicative issues, such as whether a certain license should issue to a petitioner. When agencies are forming policy through a few major adjudications, this may, however, be a distinction with little practical difference.

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[121] *See, e.g.*, J. Landis, *supra* note 119, at 24-33; Dixon 12-13; Redford, *supra* note 120, at 308-12.

[122] L. Jaffe, Judicial Control of Administrative Action 23 & n.33 (1965).

[123] Friendly 152; Dixon 9.

[124] Friendly 150.

[125] Cary 22, 136.

[126] Cary 21. The most radical suggestions for coordinating agency policymaking tend to resemble the famous Hector-Minow proposals that the adjudicative function of agencies be removed and placed in a single administrative court, so that a super agency could coordinate policy. Cary 125-27. *See generally* 1 K. Davis, Administrative Law Treatise § 1.04-4 (Supp. 1970). These proposals give short shrift to the fact that all agency functions make policy and act in an interdependent fashion.

[127] 1 K. Davis, *supra* note 126, at § 1.04-4.

[128] *Id.* § 1.03, at 23 n.19.

[129] Friendly 150-51.

If agencies are left to decide only specific issues and not broad policy, their expertise is largely wasted. Also, the blurring of responsibility for a given policy decision is unlikely to aid government efficiency.[132] It is even harder to justify thoroughgoing White House control in terms of the basic purpose behind the formation of independent agencies. For these agencies must be regarded as very much the agents of Congress, exercising delegations of power that were purposely given to a separate agency and not to the executive branch.[133] Although the general reasons for the creation of independent agencies are well known, it seems unlikely that legislation governing a particular agency will reveal much to guide those trying to decide how much executive control is permissible. One could ask whether a given function is one meant to be exercised independently, but legislative delegations of power are customarily too vague to be enlightening in this regard. Perhaps the vagueness of the limits to presidential propriety in directing independent agency policymaking helps to explain the absence of a tradition of presidential aggressiveness in asserting such a power. Yet a statute clearly conferring a power of direction seems unwise, since it is unlikely that the difficulties the agencies have in setting policy would be cured by shifting those functions partially into the White House.

V. CONCLUSION

The independent agencies exist in a state of tension between President and Congress.[134] Ambiguities in their status probably cause practical accommodations of power, but can mask arbitrary or inefficient conduct of government. The President's power to exempt independent commissioners from mandatory retirement is perhaps not the weightiest hawser upon which Congress and President can haul, but there is needless uncertainty in the present situation.

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[130] *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.03 (1972) (distinguishes between adjudicative and legislative issues).

[131] *Cf.* Redford, *supra* note 120, at 306.

[132] *See* FRIENDLY 153.

[133] CARY 20, 135-36; FRIENDLY 153-56.

[134] *See* CARY 4.

The preferable resolution of the issue would be to except the independent commissioners from mandatory retirement, either by statutory interpretation or by explicit amendment to section 8335. Arguably, the statutes setting the terms of independent commissioners should be read as implied exceptions to the mandatory separation and discretionary exemption provisions of the Retirement Act. But in the absence of any definitive judicial statement on the question, Congress should amend section 8335 to exclude members of major independent agencies from its coverage. This recommendation rests on a judgment that institutional considerations underlying the statutory terms of these officers have overriding significance compared to the flexibility afforded by the current exemption practice. Also, the major policies behind mandatory retirement and presidential exemption can be achieved in satisfactory measure in the reappointment process.

An alternative recommendation, less desirable because it contains some potential intrusion upon commission independence, is that a statutory amendment restrict the presidential exemption power. Such an amendment could require that exemptions under section 8335(c) be for the remainder of a commissioner's term, or that they be for a set period not subject to renewal. Either recommendation is preferable to an amendment removing the exemption power over the commissioners and subjecting them to mandatory retirement, because the policies favoring mandatory retirement for most government employees have diminished force when applied to the commissioners. In any event, it is important that Congress resolve the question whether the mandatory retirement statute should be read to apply to the commissioners at all. Currently prevailing assumptions that the exemption practice is valid in this application seem to stem more from the absence of court challenge than from any demonstration of clarity in relevant congressional purpose.

APPENDIX

TABLE 1

EXEMPTIONS OF MEMBERS OF THE INDEPENDENT COMMISSIONS AND THE TAX COURT,* 1946 TO DATE

President and Year	Exec. Order No.	Name	Agency	Exec. Order No. of Prior Exemption	Period of Exemption
HST					
1946	9780	C.B. Aitchison	ICC	—	Indefinite to term**
	″	W.A. Ayres	FTC	—	″
	″	E.L. Davis	FTC	—	″
	″	C.L. Draper	FPC	—	″
	″	S.B. Hill	Tax Court	—	″
	″	L.A. Johnson	Tax Court	—	″
1947	9895	W.W. Arnold	Tax Court	—	Indefinite to term
	″	J.A. Tyson	Tax Court	—	″
1948	9954	J.M. Johnson	ICC	—	Indefinite to term
	9956	H.B. Mitchell	CSC	—	Seven months
	9963	S.B. Hill	Tax Court	9780	Indefinite to new term
	9966	C. Miller	ICC	—	Indefinite to term
	9983	G.S. Ferguson	FTC	—	Indefinite to term
	10,021	H.B. Mitchell	CSC	9956	Indefinite
1949	10,034	J.M. Johnson	ICC	9954	Indefinite to new term
	10,073	E. Black	Tax Court	—	Indefinite to term
	10,094	C.B. Aitchison	ICC	9780	To qualification of successor
1950	10,146	W.J. Patterson	ICC	—	Indefinite to term***
	10,198	P.A. Walker	FCC	—	Indefinite to term
1951	10,255	C.L. Draper	FPC	9780	New term (five years)
	10,315	W.E. Lee	ICC	—	Indefinite to term
1952	10,330	F. Perkins	CSC	—	Indefinite
RMN					
1970	11,568	A.E. MacIntyre	FTC	—	One year
1972	11,642	A.E. MacIntyre	FTC	11,568	One year
1973	11,704	A.E. MacIntyre	FTC	11,568, 11,642	One year
	11,756	W. Gillilland	CAB	—	Eleven months
1974	11,791	K.H. Tuggle	ICC	—	Eighteen months
GRF					
	11,824	W. Gillilland	CAB	11,756	Six months
	11,826	W. Deason	ICC	—	Eleven months

* This list includes members of the major regulatory agencies (ICC, FTC, FPC, SEC, CAB, FCC, NLRB), the Civil Service Commission, and the Tax Court. The titles of other exempted employees appear in Table 2. See note 7 *supra.*

** Exemptions with this designation in the Table were phrased in substance as follows: "for an indefinite period of time not extending beyond the expiration of his present term of office . . . ." A variation, adding a proviso that "for the purposes of this order, his present term of office shall be considered as expiring upon the appointment and qualification of his successor," is found in Exec. Orders Nos. 9954, 9983, 10,034, 10,146, and 10,315. The statutes setting the terms of the FTC and ICC commissioners involved provide for their continued service until a successor has been appointed and has qualified, to prevent vacancies. 15 U.S.C. § 41 (1970), 49 U.S.C. § 11 (1970).

*** Executive Order dated August 2, 1950, and made retroactive to July 1, 1950.

TABLE 2

OTHER EMPLOYEES EXEMPTED BY EXECUTIVE ORDER, 1946 TO DATE

President	Exec. Order No.	Title of Employee
HST	9780	Commissioner, U.S. Tariff Commission
	"	Director, FDIC
	"	Member, National Mediation Board
	9973	Executive Secretary, Panama Canal
	10,002	Commissioner, International Boundary & Water Commission
	10,215	Comptroller of Customs
	10,225	Collector of Customs
	10,229	USDA employee
	10,239	Collector of Customs
	10,273	Director, Export-Import Bank
	10,320	Commissioner, International Boundary & Water Commission
	10,333	Collector of Customs
	10,334	Organist and Choirmaster, U.S. Military Academy
	10,364	Public Printer
DDE	10,569	Organist and Choirmaster, U.S. Military Academy
JFK	11,024	Director, National Science Foundation
LBJ	11,154	Director, FBI
	11,378	Postmaster
RMN	11,619	Secretary to Former President Truman
	11,653	U.S. Marshal
	11,657	Member, Federal Farm Credit Board
	11,675	Member, Subversive Activities Control Board
	11,757	Librarian of Congress
GRF	11,847	Vice President, Export-Import Bank
	11,869	Chairman, Commission on Civil Rights
	11,909	Vice President, Export-Import Bank

REPORT IN SUPPORT OF RECOMMENDATION 76–2

STRENGTHENING THE INFORMATIONAL AND NOTICE GIVING FUNCTIONS OF THE FEDERAL REGISTER

*Edward A. Tomlinson**

I. SUMMARY OF REPORT

This Recommendation and accompanying report seek ways to strengthen the informational and notice giving functions of the daily Federal Register and the annual editions of the Code of Federal Regulations. Initially, efforts were made to determine if the growing bulk of the daily Federal Register might be reduced by pruning the material presently published. It quickly became apparent that the wide-spread recognition of the importance of public information and public participation in administrative proceedings made it difficult if not impossible to reduce significantly the total number of pages in the Federal Register. There can be no significant reduction in size unless there is first a reduction in the level of federal regulatory activity. While it is certainly possible to uncover in the thousands of pages printed monthly individual items that do not belong in the Federal Register,[1] there is little question that the great majority of the documents appearing in the Federal Register are of use to someone. It is also easy to discover additional categories of documents that might well be published in the Federal Register. The main thrust of the Recommendation is therefore not to reduce the size of the Federal Register publications (although a reduction in volume may occur in some areas if the Recommendation is implemented), but to improve the useability and effectiveness of the Federal Register System. In particular, the Recommendation seeks to coordinate the centralized informational and notice giving functions of the Federal Register with similar functions performed by individual agencies. Ideally, the Federal Register System should alert the public to all sources of information and all categories of public notices and then allow the reader to "plug into" those that interest him either by going to a particular agency or by subscribing to a particular Federal Register publication. While a centralized Federal Register affording legal notice of each agency's general law and public notices is a necessary supplement to efforts by individual agencies to publicize the same material, subscribers with specialized interests should not be forced to receive material that they know in advance does not interest them. The long-range solution to the daily Federal Register's crushing bulk is therefore to break down the present unitary publication into separate publications. Libraries and some large businesses or law firms will of course continue to subscribe to the entire Federal Register, but the great majority of subscribers will be able to choose those portions that interest them.

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[1] Examples of documents whose publication in the Federal Register seems questionable under any reasonable publication criteria would include the lengthy annual lists of licensed animal exhibitors (see 40 FR 8837–8841, March 3, 1975), registered animal exhibitors (see 40 FR 10496–10502, March 6, 1975), and licensed animal research facilities (see 40 FR 10200–10214, March 5, 1975) published by the Animal and Plant Health Inspection Service in the Department of Agriculture. The Animal Welfare Act of 1970 (7 U.S.C. §2131) requires the compilation of these lists, but it is only the implementing regulation (9 CFR 2.127 (1975)) and not the statute itself which expressly requires the publication of the lists in the Federal Register. Another example is the periodic lists published in the Federal Register (see 40 FR 8852–8853, March 3, 1975) by the Federal Maritime Commission of vessels issued certificates of financial responsibility for oil pollution. Once again it is the regulation (46 CFR 542.8 (1974)) and not the statute (section 311(p) of the Federal Water Pollution Control Act, 33 U.S.C. §1321(p)) which requires the use of the Federal Register.

II. Description of the Federal Register System

History of the Federal Register System. The Roman Emperor Caligula wrote his laws on high pillars in print too small for ordinary passersby to read them.[2] Conditions have improved since the time of Caligula, but the problem persists. How does the ordinary citizen know what his government is doing and what the government expects of him? This informational need is particularly acute in a democracy where the governed are supposed to control the governors. James Madison eloquently recognized this need when he chaired the committee which drafted the First Amendment to the Constitution. He then said:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

The twentieth century in the United States has witnessed a tremendous growth of regulatory activity by the executive branch of government. Much of the law that controls the everyday activities of individuals and businesses is today the outgrowth of an administrative process defined to include "those law-making and law-deciding powers which are exercised not by the legislature or the traditional courts, but by organs of government classified in our scheme as 'executive'." [3]

Prior to the enactment of the Federal Register Act in 1935,[4] there was no centralized permanent mechanism for giving public notice of executive actions. Sections 5(a)(1) and (2) of the Act [5] required for the first time the official publication of Presidential proclamations and Executive orders and other documents having general applicability and legal effect. Section 5(a)(3)[6] provided in addition for the official publication of all documents or classes of documents required to be published by a specific Act of Congress. Since the passage of the Federal Register Act, Congress has enacted two or three hundred statutes specifically requiring the publication of particular documents or classes of documents. All documents required to be published were to be filed with the Office of the Federal Register and published by the government in an official publication known as the Federal Register. Section 5(b) of the Act,[7] also permitted the publication in the Federal Register of other documents (not including "comments or new items of any character") if their publication was authorized by regulations approved by the President. While the Federal Register Act originally provided for the compilation of all documents having general applicability and legal effect issued before the initiation of the Federal Register and still in force and effect, it was quickly amended to provide for the annual codification of all documents having general applicability and continuing legal effect into a special edition of the Federal Register known as the Code of Federal Regulations.[8]

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[2] J. Bentham, *The Limits of Jurisprudence Defined* 155, 282 (Everett ed. 1945).

[3] L. Jaffe and N. Nathanson, *Administrative Law: Cases and Materials* 12 (3rd ed. 1968).

[4] 49 Stat. 501 (1935), now codified as 44 U.S.C. §§1501–1511.

[5] 44 U.S.C. §1505(a)(1) and (2).

The supporters of the Federal Register Act were fighting what they referred to as "government in ignorance of the law."[9] Their concern focused primarily on the existence of regulations that had the force and effect of law but were only published in separate paper pamphlets and were often unknown to the affected members of the general public. To deal with this problem of unpublicized executive or administrative "legislation," they proposed the systematic and uniform publication of rules and regulations upon issuance and the annual codification and indexing of all rules so published. The model suggested for emulation was the system for printing Congressional statutes.[10]

The seriousness of the pre-1935 situation was highlighted by the predicament of a gentleman named Smith who was arrested, indicted and jailed for several days for violating a paragraph in the Petroleum Code which unbeknownst to all concerned had inadvertently been repealed. Only when Smith's case reached the Supreme Court did the government realize its error and dismiss the prosecution.[11] Justice Brandeis in the famous oral argument in the "hot oil" case [12] several months later extracted from embarrassed government counsel the foul-up that had occurred in the *Smith* case and thus gave wide publicity to the need for the official publication of executive regulations that had the force and effect of law. The enactment of the Federal Register Act promptly followed.

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[6] 44 U.S.C. §1505(a)(3). The full text of the publication requirements in Section 5(a) presently reads as follows:

> (a) *Proclamations and Executive Orders; documents having general applicability and legal effect; documents required to be published by Congress.*
>
> There shall be published in the Federal Register —
>
> (1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof;
>
> (2) documents or classes of documents that the President may determine from time to time have general applicability and legal effect; and
>
> (3) documents or classes of documents that may be required so to be published by act of Congress.
>
> For the purpose of this chapter every document or order which prescribes a penalty has general applicability and legal effect.

These requirements are the same as in the original text of Section 5 except for some changes in wording that occurred as part of the recodification of Title 44 in 1968.

[7] 44 U.S.C. §1505(b). The President has delegated his authority under the Act to the Attorney General and the Administrator of General Services. Ex. Ord. No. 10530, 19 FR 2709 (May 11, 1954), set out as a note under Section 301 of Title 3 of the United States Code.

[8] 50 Stat. 304, now codified as 44 U.S.C. §1510. For a description of the Federal Register Act's background and passage, see Ronald, Publication of Federal Administrative Legislation, 7 *Geo. Wash. L. Rev.* 52, 63–69 (1938).

[9] Griswold, Government in Ignorance of the Law — A Plea for Better Publication of Executive Legislation, 48 *Harv. L. Rev.* 198 (1934). Griswold's influential article was frequently cited by Congressman Celler and other Congressional sponsors of the Federal Register Act. Ronald, *supra* note 8, at 68–69.

[10] Griswold, *supra* note 9 at 209.

The framers of the Federal Register Act did not envision the publication in the Federal Register of administrative decisions in particular cases, although some supporters of the Act suggested that the government might also publish a newspaper or official gazette for legal notices.[13] Administrative decisions and opinions in particular cases did not belong in the Federal Register because "[s]uch decisions do not represent the exercise of any statutory power and their publication with true rules and regulations would serve only to give them a dignity which they do not deserve." [14] Section 8 of the original Act,[15] however, did provide that a notice of an administrative hearing or of any opportunity to be heard "shall be deemed to have been given" to all persons within the continental United States by publication of the notice in the Federal Register. The special committee of government lawyers appointed by President Roosevelt's National Emergency Council, whose report formed the basis for the Federal Register Act, viewed this section as providing a simple and inexpensive medium for giving official or legal notice of proposed governmental actions.[16] A limited number of agencies promptly took advantage of the section to give legal notice of pending adjudicatory proceedings through the Federal Register; and at least one leading commentator urged other agencies to do so in order to save money by substituting free hearing notices in the Federal Register for paid notices in the commercial press.[17]

The Administrative Procedure Act enacted in 1946 expanded considerably the number of documents required to be published in the Federal Register. Under the original public information section of the Act,[18] each agency was required to publish not only its "substantive rules adopted as authorized by law" (which roughly coincided with the documents of general applicability and legal effect already required to be published under section 5(a) of the Federal Register Act) but also 1) descriptions of its central and field organization including delegations by the agency of final authority; 2) statements of the general course and method by which its functions are channeled and determined; and 3) statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public.[19] The Senate and House Reports on the Administrative Procedure Act viewed the public information requirements as among the most useful provisions of the bill. According to the Senate Report, they were designed "to take the mystery out of administrative procedure" and were based upon the theory "that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have the ready means of knowing with definiteness and assurance." [20] Section 4 of the Administrative Procedure Act [21] also required agencies for the first time to publish notices of proposed rule making in the Federal Register except where all persons subject to the rule are named and are either personally served with the proposal or otherwise receive actual notice thereof. The notice of proposed rule making must contain a statement of the time, place and nature of the rule making proceedings, a reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved.

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[11] *United States v. Smith*, 293 U.S. 633 (1934).

[12] *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

[13] Griswold, Government in Ignorance of the Law — A Plea for Better Publication of Executive Legislation, 48 *Harv. L. Rev.* 193, 208–209 (1934).

[14] *Id.* at 208 n.40.

[15] 44 U.S.C. §1508. The present text of this section excludes from this provision "cases where notice by publication is insufficient in law."

[16] Ronald, Publication of Federal Administrative Legislation, 7 *Geo. Wash. L. Rev.* 52, 77–78 (1938).

[17] *Id.* at 78.

[18] 60 Stat. 237, 5 U.S.C. §1003 (1946) (section 3 of original Act).

Professor Frank Newman conducted in the late 1940's the first comprehensive study of the Federal Register System (i.e., the daily Federal Register and the annual codification of material in the Code of Federal Regulations). He found "an unwitting conspiracy to exclude from the Federal Register a huge quantity of documents that have general applicability and legal effect." [22] Many agencies remained ignorant of the publication requirements or did not believe that Congress seriously intended them to comply with the requirements. While Professor Newman did cite numerous instances where agencies failed to publish in the Federal Register substantive rules and organizational changes, his concern focused primarily on policy statements that were not published in the Federal Register but appeared only in agency press releases, on agency forms, in staff manuals, or in opinions in adjudicatory proceedings.

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[19] The complete text of the publication requirements in the original Section 3(a), 5 U.S.C. §1003(a) (1946), reads as follows:

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency —

(a) *Rules* — Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

[20] S. Rep. No. 752, 79th Cong., 1st Sess. 21 (1945).

[21] 5 U.S.C. §1004 (1946).

[22] Newman, Government and Ignorance — A Progress Report on Publication of Federal Regulations, 63 *Harv. L. Rev.* 929, 933–34 (1950).

Concern over the non-publication of documents in the Federal Register has greatly abated since Professor Newman's study. Professor Davis, writing in the 1958 edition of his *Administrative Law Treatise*, concluded that the Federal Register System (which now also included the annual United States Government Organization Manual) contained "most of what the public needs to know concerning rules and related official statements." [23] Similar conclusions were reached by the Senate and House committees that drafted the 1966 amendments to section 3 (the public information section) of the Administrative Procedure that became the Freedom of Information Act.[24] Both the Senate and House Reports stated that the amendments made only minor clarifying changes in the publication requirements for the Federal Register.[25] The Senate Report specifically stated that there were few changes because there had been few complaints about the omission from the Federal Register of necessary official material. "In fact, what complaints there have been have been more on the side of too much publication rather than too little." [26] Both reports expressed concern about the bulkiness of the Federal Register and the inclusion of a new provision in the amended section 3 authorizing the Director of the Federal Register to permit agencies to incorporate by reference in the Federal Register matter reasonably available to the class affected thereby was intended to aid in reducing the size of the Federal Register.[27]

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[23] 1 K. Davis, *Administrative Law Treatise* 391 (1958).

[24] 80 Stat. 250 (1966), codified by 81 Stat. 54 (1967) in 5 U.S.C. §552.

[25] S. Rep. No. 813, 89th Cong., 1st Sess. 6 (1965); H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 7 (1966).
The language of former section 3(a) nevertheless underwent substantial revision. The publication requirements in the amended section 3(a)(1), 5 U.S.C. §552(a)(1), now read as follows:

> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —
>
> (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
>
> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> (C) rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports or examinations;
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

The 1974 Freedom of Information Act Amendments, 88 Stat. 1561, did not affect the text of §552(a)(1).

[26] S. Rep., *supra* n.25, at 6.

[27] H. R. Rep., *supra*, n.26, at 7.

This general satisfaction with the operation of the Federal Register System no doubt reflected the fact that with the passage of the Administrative Procedure Act more and more agencies became accustomed to the publication requirements. During the 1950's and 1960's instances became rarer where an agency failed to publish a substantive or procedural rule or a change in organizational structure. Courts refused to enforce against the ignorant unpublished regulations, although they differed over the question whether unpublished regulations could still be enforced against those with actual knowledge thereof.[28] The Federal Register expanded commensurately in size and exceeded 15,000 pages per year by the early 1960's.

The Role of the Federal Register System. From its inception in 1935 the informational and notice-giving functions performed by the Federal Register System have been limited in scope. The daily Federal Register has contained primarily the texts of final and proposed rules as well as a miscellany of hearing notices. Adjudicatory opinions and notices of decisions in adjudicatory matters have rarely been published in the Federal Register. If an agency chose to articulate policy or to make law through adjudication, that portion of the agency's operative law would not appear in the Federal Register or the Code of Federal Regulations. Furthermore, the Federal Register would be of little use to the interested reader if an agency neglected to formulate its policies through the adoption of legislative or interpretative rules or policy statements of general applicability but instead utilized for policy formulation unpublished advisory pronouncements, speeches to regulated interests, or staff manuals and other forms of internal directives, or proceeded on a completely ad hoc basis. Thus, the user of the Federal Register and the Code of Federal Regulations could never be certain that what he found therein constituted the full body of law applicable to his or his client's case. Of course, the published material would likely include all rules that a person could be directly sanctioned for violating (i.e., all legislative regulations). While a person subject to a legislative regulation can be fined or otherwise sanctioned for violating it, he cannot be fined or sanctioned for "violating" a precedent or staff manual that is applicable to his fact situation. Case law therefore does not bind non-parties and serves only as a precedent for subsequent cases. Interpretative and policy materials are likewise lacking in legal effect and can only provide a basis for predicting subsequent agency action.

Agency case law and interpretative and policy pronouncements nevertheless indicate what the agency expects of those persons subject to its authority. They are therefore of interest to persons affected by the agency's exercise or nonexercise of its statutory powers. An ideal informational system would convey to the user not only an agency's prescriptive regulations but also all interpretations and policy statements adopted by the agency that have applicability beyond the context in which they were issued, regardless of whether they appeared in an adjudicatory opinion, press release, staff directive, or other internal document. An annotated statutory code prepared by a commercial publisher approaches this ideal by digesting the judicial case law which applies or cites each statutory provision. Even here the informational system is incomplete because the annotations to a criminal or regulatory statute do not normally include interpretative or policy statements by the officials charged with enforcing those laws disclosing their prosecutorial or enforcement positions.

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[28] *Hotch v. United States*, 212 F.2d 280 (9th Cir. 1954) (unpublished regulation not enforceable against persons with actual knowledge); *United States v. Aarons*, 310 F.2d 341 (2d Cir. 1962) (unpublished regulation enforceable against persons with actual knowledge). The 1966 Amendments to section 3 resolved this issue in favor of enforceability against persons with actual knowledge.

The Structure of the Federal Register and the Code of Federal Regulations. The daily Federal Register today faces a paper explosion. The number of triple-columned pages published annually has expanded from 17,206 pages in 1965 to 20,466 pages in 1969, 35,591 pages in 1973 and 45,422 pages in 1974. During the first six months of 1975, the Federal Register contained 27,635 pages. The number of subscribers to this gargantuan publication has more than tripled in the last five years from 10,000 subscribers in 1970 to 26,000 in 1972 to approximately 33,000 today. This increase is explainable in part by the corresponding increase in Federal regulatory activity of wide impact in the environmental, occupational safety and health, and consumer areas. The Federal Register is also a good bargain, since the $45.00 annual subscription rate is significantly lower than the rate for any of the specialized private services published by the Commerce Clearing House, the Bureau of National Affairs, Prentice Hall, and other commercial firms. While exact figures are not available, the cost to the government for printing the daily Federal Register is in the range of $200 per page. Not surprisingly, almost 60% of the subscribers to the Federal Register are manufacturing and business enterprises. Another 8% are lawyers and law firms, while the remaining subscriptions are widely scattered among libraries, governmental agencies, communications media, labor organizations, and various public-service committees, associations and councils.

The great majority of subscribers apparently do not save their copies of the daily Federal Register for more than one year. The bulkiness of the Federal Register and the cheap quality of its paper make preservation over any period of time quite difficult. Most libraries, including law libraries, simply do not have the space. Furthermore, most material appearing in the Federal Register which is of continuing interest is (or should be) preserved in the Code of Federal Regulations. The remainder of the material is generally of immediate interest only and can safely be discarded after one year. Complete sets of the Federal Register, bound or on microfilm, are maintained at the Office of the Federal Register and at depository libraries around the country; and specialists with particular needs for dated material published in old issues of the Federal Register can normally inspect the material and obtain copies from those sources.

The Code of Federal Regulations presently contains 116 volumes in 50 separate titles whose subject matter roughly coincides with the subject matter of the corresponding titles in the United States Code. Each title contains from one to a maximum of twelve separate volumes. There is also an elaborate numbering system for dividing each title into subtitles, chapters, parts, sections and paragraphs. The regulations for each agency are in most instances grouped together in one or more volumes in a single title of the Code, but the regulations for a handful of agencies are divided by subject matter and published in two or more titles. Each volume of the Code is sold separately, and differences in subject matter between volumes have resulted in wide variations in the number and identity of subscribers from one volume to the next.[29] New additions for each volume are published at least annually with the appearance of new volumes staggered at quarterly intervals throughout the year. The total number of pages in the Code exceeds 100,000, but the quality of the binding and of the paper makes storage relatively easy. Many libraries preserve editions from past years in much the same fashion as superseded legislative codes to enable interested persons to determine the applicable law at a given date in the past.

Publication of a document in the daily Federal Register is a necessary conduit for publication in the Code of Federal Regulations. Section 10 of the Federal Register Act [30] authorizes the Administrative Committee of the Federal Register [31] to publish in the Code "documents of each agency of the Government having general applicability and legal effect . . . [that] are relied upon by the agency as authority for, or are invoked or used by it in the discharge of, its activities or functions." This codification requirement is limited to those documents in effect as to facts arising on or after the cutoff date specified by the Administrative Committee for the publication of the volume. Quite plainly the intent of the Congress is to preserve in the Code of Federal Regulations (which is defined in section 10 to be a special or supplemental edition of the Federal Register) those documents of general applicability that have continuing legal effect. Given the "throw-away" quality of the daily Federal Register, it is desirable that all documents of continuing interest that appear in the Federal Register should be preserved in the Code of Federal Regulations to the extent permitted by section 10 of the Federal Register Act.

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[29] The Director of the Federal Register has proposed a similar subscription system for the Federal Register itself. Under this system, related agencies would be joined together and print all their documents (except emergency documents) on a single day of the week. Subscribers could if they choose subscribe only for the day or days that interest them. See, Office of the Federal Register, Advanced Notice of Proposed Rule Making, *Agency Publication on Assigned Days of the Week*, 40 FR 26046 (June 20, 1975).

[30] 44 U.S.C. §1510.

[31] The committee consists of the Archivist of the United States, an officer of the Department of Justice designated by the Attorney General, and the Public Printer. 44 U.S.C. §1506. The Director of the Office of the Federal Register serves as Secretary to the Committee. 1 C.F.R. 2.2(c) (1975).

The daily Federal Register is presently divided into four sections: Presidential Documents; Rules and Regulations; Proposed Rules; and Notices. The Presidential Documents section has traditionally been the smallest of the four sections and has generally comprised no more than a hundred or so pages per year [32] containing Executive orders and Presidential proclamations that vary in importance from orders establishing immigration quotas or antidiscrimination policies to proclamations announcing White Cane Safety Day or similar federal observances.[33] Executive Orders of continuing legal effect are codified in Title 3 of the Code of Federal Regulations on the President or in the relevant subject matter titles of the Code. The documents published in the Rules and Regulations section and the Proposed Rules section of the Federal Register are all arranged by title and are numbered in accordance with the codification system used in the Code of Federal Regulations. Despite the titular designation of the Rules and Regulations section, it is not limited to legislative regulations that have the force and effect of law but also contains interpretative rules [34] and policy statements [35] that are then codified or otherwise preserved in the Code.

The Notices section, on the other hand, contains a miscellany of documents whose sole unifying characteristic appears to be the unsuitability of publishing them in one of the other three sections. The Notices section is rapidly becoming the largest of the four sections and is certainly the most disorganized. The documents are supposedly arranged by agency according to a now superceded list for the arrangement of the agencies in the United States Government Manual (departments first in order of their date of origin, then independent agencies alphabetically); but the late arrival for publication of many documents often disrupts this order of publication. The majority of notices either relate to pending or just concluded adjudicatory proceedings or announce upcoming advisory committee or other agency meetings. Policy statements [36] and interpretative rules [37] however, sometimes appear in the form of notices, as do organizational changes and delegations of authority [38] for those agencies that do not codify their descriptions of organization and functions in the form of regulations in the Code of Federal Regulations.

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[32] The volume of Presidential documents published in the Federal Register during 1975 has expanded considerably because the Congressional Budget and Impoundment Control Act of 1974, 88 Stat. 336 (1974), now requires the President to publish in the Federal Register proposed rescissions, reservations, and deferrals of budget authority. Several of these documents have occupied more than 100 pages in the Federal Register.

[33] See 40 FR 26667 (June 27, 1975) for Proclamation of White Cane Safety Day.

[34] See the interpretative rules of the Equal Employment Opportunity Commission in 29 CFR Part 1607 upheld by the Supreme Court in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

[35] See the Civil Aeronautics Board's statements of general policy codified in 14 CFR Part 399, all of which first appeared in the Rules and Regulations section of the daily Federal Register.

[36] The Federal Communications Commission, for example, publishes in the Notices section its formally adopted policy statements on domestic broadcasting. See e.g., *Fairness Doctrine and Public Interest Standards*, 39 FR 26371 (July 18, 1974) (a "restatement and clarification of the essential principles and policies of fairness doctrine," at 26384); *Children's Television Report and Policy Statement*, 39 FR 39395 (November 6, 1974); *Report on the Broadcast of Violent, Indecent and Obscene Material*, 40 FR 11023 (March 10, 1975).

The Office of the Federal Register has struggled manfully to bring the mass of material submitted to it for publication into some semblance of order. The Office has developed a wide range of indexes and finding aids that have largely stilled the critics of the late 1950's and early 1960's who claimed that it was difficult to find all the relevant documents in the Federal Register and the Code of Federal Regulations.[39] The sheer volume of the material still impedes the searcher, but he is no longer hindered by the absence of indexes or finding aids. The Office of the Federal Register has also complied with two out of three minor recommendations of the Administrative Conference on the improvement of its indexing systems.[40] More recently, the Office has concentrated on the format and intelligibility of documents submitted to it for publication. In January 1975, it published and distributed to the agencies the final edition of its *Document Drafting Handbook* which established a uniform and intelligible format for the publication of final and proposed regulations. The Office recognizes the need for a similar effort to deal with the present disorder in the Notices section, but it is first necessary to determine whether many of the notices should be published at all or whether at least their format should be drastically changed.

The Publication of Documents Having General Applicability. The primary role of the Federal Register continues to be the publication of documents having general applicability. While this material has become voluminous in recent years, its continued publication is essential. Hidden law is worse than too much law. The enormous size of the Rules and Regulations section of the Federal Register is primarily attributable to the intensity and breadth of federal regulatory activity. There can be no significant reduction in its size unless there is a concomitant reduction in the level of federal regulatory activity. Published rules and procedures are essential if regulation is to be fair and effective, and a number of agencies still publish too little rather than too much material of general applicability.[41]

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[37] The Consumer Product Safety Commission, for example, recently published in the Notices section a peculiar "Policy Clarification" that interpreted the Mattress Standard applicable to mattresses "manufactured for sale" to cover mattresses "renovated" for sale. 40 FR 19677 (May 6, 1975).

[38] The Domestic and International Business Administration in the Department of Commerce, for example, publishes in the Notices section its Organization and Function Orders. See, e.g., DIBA Organization and Function Order 41-1, 40 FR 12696 (March 20, 1975), that superseded prior orders published in the Federal Register.

[39] See, The Federal Register and the Code of Federal Regulations — A Reappraisal, 80 *Harv. L. Rev.* 439, 449 (1966).

[40] Recommendation 3 on Parallel Table of Statutory Authorities and Rules, 1 ACUS *Recommendations and Reports* 11; Recommendation 11 on Publication of a Guide to Federal Reporting Requirements, 1 ACUS *Recommendations and Reports* 24 (not implemented at this time); and Recommendation 12 on Analytic Subject-Indexes to Selected Volumes of the Code of Federal Regulations, 1 ACUS *Recommendations and Reports* 25.

The task of defining "general applicability" does raise some problems. Section 5(a)(2) of the Federal Register Act requires the publication in the Federal Register of "documents or classes of documents that the President may determine from time to time have general applicability and legal effect." [42] The President has delegated his authority under the act to the Attorney General and the Administrator of General Services, who must approve the regulations of the Administrative Committee of the Federal Register.[43] The Administrative Committee has by regulation defined "document having general applicability and legal effect" in the following manner:

> "Document having general applicability and legal effect" means any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations.[44]

The text of section 5(a) of the Act already contained a partial definition of "general applicability and legal effect" in its final sentence: "For the purposes of this chapter every document or order which prescribes a penalty has general applicability and legal effect." This provision classifies documents that prescribe a penalty as documents having general applicability and legal effect but does not purport to be a complete definition of those terms. The definition of the Administrative Committee plainly covers a considerably broader range of documents than does the statutory provision.

The publication requirements in section 552(a)(1) of the Administrative Procedure Act [45] overlap those of the Federal Register Act but are not limited to documents that have "legal effect." Thus section 552(a)(1)(D) requires each agency to publish not only its substantive rules of general applicability but also "statements of general policy or interpretations of general applicability formulated and adopted by the agency." Interpretations and policy statements are normally defined in terms of their lack of legal effect.[46] Likewise sections 552(a)(1)(A)–(C) require agencies to publish their procedural rules and descriptive statements of their organization and functions. These provisions have general applicability and are usually enforceable against the agency,[47] but they do not appear to be covered by the Administrative Committee's definition of "general applicability and legal effect" because that definition requires a substantive legal effect.

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[41] See, for example, the discussion by Professor Peter Strauss on the continued existence of hidden law and unpublished procedures in the Bureau of Land Management in the Department of the Interior in his Administrative Conference study on Rules, Adjudication and Other Sources of Law in an Executive Department; The Interior Department's Administration of the Mining Law, 74 *Col. L. Rev.* 1231 (1974).

[42] 44 U.S.C. §1505(a)(2).

[43] Ex. Ord. No. 10530, 19 FR 2709 (May 11, 1954), set out as a note under Section 301 of Title 3 of the United States Code. For the composition of the Administrative Committee of the Federal Register, see n.31 supra. The Committee has authority to enact regulations to carry out the Federal Register Act. 44 U.S.C. §1506.

[44] 1 CFR 1.1 (1975).

[45] The Administrative Procedure Act is hereafter cited by the section numbers in the present codification in Title 5. The text of Section 552(a)(1) may be found in n.25, supra.

[46] See the definitions of these phrases in Part IV of this Report.

This difference in the coverage of the publication requirements in the two Acts raises a minor problem with respect to the preservation of documents in the Code of Federal Regulations. Section 10 of the Federal Register Act directs the Administrative Committee of the Federal Register to codify in the Code "documents having general applicability *and* legal effect" (emphasis added). The Administrative Committee has not interpreted this language as a limitation on its authority to codify rules that have general applicability but lack legal effect. The applicable regulation presently requires the publication in the Code of "each Federal regulation of general applicability and current or future effect." [48] "Regulation" means the same as "rule";[49] and "rule" is broadly defined in section 551(4) of the Administrative Procedure Act to include not just legislative rules but interpretative rules, policy statements, procedural rules and organizational descriptions. Rules in these latter categories have for many years been published in the Code of Federal Regulations. Their inclusion in the Code seems entirely proper in light of the expansion of the publication requirements for the Federal Register in the Administrative Procedure Act of 1946.

The breadth of the Administrative Committee's definition of "general applicability and legal effect" raises a number of additional questions. Many documents having general applicability and legal effect may have only a limited or localized impact. For instance, a Special Notice issued by the Coast Guard closing the Thames River at New London, Connecticut, to all persons and vessels is a document having general applicability and legal effect required to be published in the Federal Register.[50] Persons who do not have actual knowledge of an unpublished Notice cannot be prosecuted criminally for violating it. While it might be argued that it is the applicable statute and not the Special Notice that "prescribes" the penalty and that the Notice therefore is not a document having "general applicability and legal effect" under the final sentence of section 5(a) of the Federal Register Act,[51] the Special Notice does prescribe "a course of conduct" for the "general public" or "the persons in a locality" and therefore is required to be published in the Federal Register in accordance with the definition of the terms "general applicability and legal effect in the Administrative Committee's regulation.[52] Documents regulating primary conduct which are not directed at named persons must therefore be published in the Federal Register even though they apply only to one locale or to one piece of equipment. Other examples include special regulations by the United States Fish and Wildlife Service for public access and use of particular wildlife refuges and Federal Aviation Administration airworthiness directives mandating changes in planes or equipment of designated manufacturers.

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[47] *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957).

[48] 1 CFR 8.1(a) (1975).

[49] 1 CFR 1.1 (1975).

[50] *United States v. Aarons*, 310 F.2d 341 (2d Cir. 1962) (Friendly, J.).

[51] 44 U.S.C. §1505(a). The final sentence provides that a document prescribing a penalty "has general applicability and legal effect." In *United States v. Richman*, 190 F. Supp. 889, 892 (D. Conn. 1961), Chief Judge Anderson held that the same Coast Guard Special Notice closing the Thames River did not "prescribe" a penalty and therefore need not be published under the Federal Register Act. Judge Anderson also noted that seamen and swimmers were more likely to receive actual notice from the Coast Guard's Notice to Mariners (where the order in question had been published) than from the Federal Register.

The definition of "general applicability and legal effect" contained in the regulation nevertheless appears to be sound even though the definition may be more expansive than required by section 5(a) of the Federal Register Act itself. It is also consistent with the "understanding" of the Administrative Conference that a matter "may be considered to be of general applicability even though it is directly applicable to a class which consists of only one or a few persons if the class is open in the sense that in the future the number of members of the class may be increased." [53] There should be official record notice of prescriptions that affect generally an undetermined class of persons (e.g., all persons who happen to boat or swim in a particular area). Bulky localized regulations widely available to persons in the locale may in appropriate cases be incorporated by reference in the Federal Register. Furthermore, the government may still enforce prescriptions of general applicability against persons with actual knowledge thereof even though the document containing the prescription has not been filed with or published in the Federal Register because of the occurrence of a fast-breaking emergency situation requiring the immediate promulgation of a regulation [54] or because of mere inadvertence.[55]

It does not appear proper or legal, however, for an agency to avoid publishing in the Federal Register documents having general applicability on the grounds that all affected persons have received actual notice thereof. The publication requirement is distinct from the consequences that follow from its non-observance (the invalidity of the document against any person who does not have actual knowledge thereof). The Coast Guard now publishes in the Federal Register its rules of general applicability for specific locales on anchorage grounds, drawbridge operation, regulated navigation areas, and closed security zones. Approximately one hundred of these documents appear per year. Until several years ago, however, the Employment Standards Administration in the Department of Labor did not publish in the Federal Register its prevailing minimum wage determinations for federal and federally assisted construction. The determinations vary from one locality to another and are often quite bulky. Contractors subject to the determinations receive actual notice thereof because the applicable wage determinations are included in their contracts. The most recent minimum wage determinations are now published every Friday in the Federal Register and often occupy more than 100 pages in a given number. The impetus behind this change was evidently a desire to afford federal and state agencies convenient access to copies of minimum wage determinations. It nevertheless seems that publication of these determinations (or at least their incorporation by reference) is required both by section 555(a)(1) of the Administrative Procedure Act and by section 5(a)(2) of the Federal Register Act because the determinations are considered by the agency to be binding rules that have general applicability (i.e., they apply to a class of persons and not to named individuals).

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[52] *United States v. Aarons*, 310 F.2d 341, 343 (2d Cir. 1962).

[53] Statement of the Administrative Conference on ABA Resolution No. 1 Proposing to Amend the Definition of "Rule" in the Administrative Procedure Act, 3 ACUS *Recommendations and Reports* 59. A matter is of "particular applicability" if the "agency clearly specifies an intention to limit its applicability to the particular person concerned." *Id*

[54] *United States v. Floyd*, 477 F.2d 217 (10th Cir. 1973)(closing of military base).

[55] *United States v. Aarons*, 310 F.2d 341, 346 (2d Cir. 1962)(interpreting Section 7 of the Federal Register Act, 44 U.S.C. §1507).

An additional category of documents that is presently published in the Federal Register is harder to classify. A good example of documents in this category are orders by the Bureau of Land Management in the Department of the Interior withdrawing or segregating designated public lands from the operation of the mining laws. These orders are "particular" with respect to the land but "general" in their effect on potential mining claimants. Analogous documents include determinations by the Federal Insurance Administration of areas eligible for flood insurance, designation of disaster areas eligible for federal assistance by the Federal Disaster Assistance Administration, and lists prepared by the Office of Education of elementary and secondary schools with high concentrations of low-income students. Once again the documents are "general" in their effect on people even though they apply to a "particular" area or facility. Case law does not provide an authoritative answer on the classification of these documents but they would seem in some cases to have only particular applicability.[56] Government action of particular applicability often affects people generally. The licensing of an hydroelectric or nuclear power plant at a particular site is a good example. These general effects do not alter the particular nature of the licensing action. Only when the government action with respect to a particular area or facility is a regulation of private activity does the action have general applicability. Thus, a Coast Guard Notice closing a navigable waterway to boaters and swimmers prescribes a course of conduct and has general applicability. Such is not the case with a public land order that does no more than terminate future opportunities of private miners. Area designations, on the other hand, often confer "rights" on the inhabitants to receive federal financial assistance and may therefore have "general applicability" under the definition of that term in the regulations of the Administrative Committee of the Federal Register. Once again that definition appears to be a sound one. There should be both an official record and public notice of documents that confer important rights on unnamed persons.

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[56] Professor Strauss reached the same conclusion in his study of the procedures of the Bureau of Land Management. Strauss, Mining Claims on Public Land, 1974 *Utah L. Rev.* 185, 202–203.

While strict adherence to the definition of "general applicability" may reduce slightly the size of the daily Federal Register, a considerable amount of bulk appears inevitable. The device of incorporation by reference has so far been used only sparingly to reduce this bulk. The facts surrounding the principal occasion on which it was used demonstrate its disadvantages. The Occupational Safety and Health Administration incorporated by reference in its initial safety and health regulations issued in 1971 a large batch of national consensus standards adopted by private standard-setting associations. The text of these standards has never appeared in the daily Federal Register or the Code of Federal Regulations. The private services cannot even print them because the texts of the standards are copyrighted; the services can only tell their subscribers to contact directly the private associations to obtain copies. Disagreements have also arisen between the rule-maker (Occupational Safety and Health Administration) and the adjudicator (the Occupational Safety and Health Review Commission) over whether particular consensus standards have been incorporated by reference.[57] Practitioners also report that the texts of the incorporated standards have not always proved to be widely and readily available. The situation now appears to have settled down somewhat. Texts of the incorporated standards are available for inspection and for reproduction of single copies at the national and regional offices of the Administration and may be obtained at reasonable prices from the private standard setting organizations. Nevertheless, in this type of situation, where the regulations are legislative rules and carry penalties for their violation, there is a compelling need for a single authoritative text which is not just on file with the Office of the Federal Register but officially published and available to the public in the daily Federal Register and the Code of Federal Regulations.

In other areas an expanded use of incorporation by reference may be a partial answer to the problem of the increasing bulk of the Rules and Regulations section of the Federal Register.[58] The use of that device may be appropriate if a widely available *government* publication (such as the Internal Revenue Service *Bulletin*) is incorporated by reference into the Federal Register. Alternatively, the Office of the Federal Register could publish bulky categories of documents that have general applicability but that primarily interest a discrete or specialized audience (e.g., minimum wage determinations for government contractors) in a separate Federal Register publication that has its own subscription fee. Breaking down the present, unitary Federal Register into separate publications in this fashion would permit persons interested only in obtaining minimum wage determinations to subscribe specially to these documents and not to the entire Federal Register. Furthermore, subscribers to the core Federal Register would have the option whether or not to subscribe in addition to one or more separate publications. The Federal Register already prints minimum wage determinations in a separate part of the daily Federal Register which is readily detachable physically from the remainder. The establishment of separate Federal Register publications for documents having general applicability is analogous to the incorporation by reference of documents appearing in other government publications, but the publication of the documents in a separate Federal Register publication has the advantage of providing a central source for the official texts of the documents. Other bulky categories of documents having general applicability that might be separately published or incorporated by reference include airway routes designated by the Federal Aviation Administration, state air quality implementation plans approved by the Environmental Protection Administration, and marketing orders issued by the Agricultural Marketing Service in the Department of Agriculture.

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[57] OSHA Field Information Memorandum 75–34, 3 CCH *Employment Safety and Health Guide* ¶7315.

[58] Incorporation by reference is not widely used at present. Two additional occasions for its use may be found in the regulations of the Hazardous Materials Regulation Board (49 CFR 171.7 (1974)) (private standard setters) and the Office of Pipeline Safety (49 CFR 190.5 (1974)) (State standards).

III. PRESERVATION IN THE CODE OF FEDERAL REGULATIONS OF DOCUMENTS HAVING GENERAL APPLICABILITY (PARAGRAPH A OF THE RECOMMENDATION)

Since most subscribers to the Federal Register are unable to retain the bulky daily editions for more than one year, the bound volumes of the Code of Federal Regulations quickly replace prior daily editions as the standard reference source available to the public. It is important therefore to codify or otherwise preserve in the Code documents of continuing interest to the public. Section 10 of the Federal Register Act [59] entrusts the Administrative Committee of the Federal Register [60] with the responsibility of preparing and publishing the Code of Federal Regulations. Paragraph A of the Recommendation provides that the Administrative Committee should act to require agencies to preserve in the Code to the maximum extent practicable Federal Register documents of general applicability that are of continuing interest to the public. While the preservation of additional documents will certainly increase the number of pages in the Code, this increase is not as serious as a concomitant increase in pages in the daily Federal Register since most subscribers to the Code only purchase those volumes that interest them. The increase is also likely to be quite small in comparison with the total number of pages in the Code since the largest category of documents having general applicability (legislative regulations) is already adequately codified.

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[59] 44 U.S.C. §1510.

[60] The Administrative Committee of the Federal Register consists of the Archivist of the United States, an officer of the Department of Justice designated by the Attorney General, and the Public Printer. The Director of the Federal Register acts as secretary of the Committee. See 44 U.S.C. §1506.

Two categories of documents that are published in the daily Federal Register but are often not preserved in the Code deserve particular attention: first, the descriptions of each agency's organization and functions (including delegations of authority) that are required to be published in the Federal Register under sections 552(a)(1)(A) and (B) of the Administrative Procedure Act; and second, the preambles to newly promulgated rules that contain the agency's concise general statement of the rule's basis and purpose required by section 553(c) of the Administrative Procedure Act to be "incorporated" into the rule. An agency's failure to preserve in regulation form documents in the first category is particularly undesirable, and it appears practicable to end this practice in most if not all cases. The documents in the second category present more difficulties; and it will sometimes require considerable experimentation and ingenuity to preserve worthwhile material from the preambles without adversely affecting the size and orderliness of the Code of Federal Regulations.

Paragraph A of the Recommendation provides for the preservation in the Code of documents in these two categories only when it is practicable to do so. The standard of practicability permits agencies to consider not only the cost and effort involved in preserving particular documents in the Code but also the utility of doing so. Common sense dictates that even legislative regulations need not be preserved in all cases. The United States Fish and Wildlife Service, for instance, does not reprint in the Code of Federal Regulation its annual special regulations for individual wildlife refuges. The regulations for each refuge are initially published in the Rules and Regulations section of the daily Federal Register and are then distributed at the agency's headquarters for that refuge.[61] If the regulations are readily available locally, it would be wasteful to reprint them in the Code where they would very likely be dated by the time they appeared in the bound volume.

While paragraph A specifically recommends the preservation in the Code of descriptions of organization and functions and of basis and purpose statements, it also provides more generally for the preservation where practicable of all documents having general applicability that are of continuing interest to the public.[62] Other categories of documents that require additional preservation efforts include interpretations of general applicability and statements of general policy which are sometimes published only in the Nation section of the daily Federal Register. This problem is discussed further in the discussion of paragraph B of the Recommendation on the publication in the Federal Register of interpretations of general applicability and statements of general policy.

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[61] 50 CFR 28.25 (1974).

[62] It is fervently hoped that the standard of "practicability" adopted in the Recommendation would be understood to bar the preservation in the Code of the descriptions of each agency's recording-keeping systems required to be published in the Federal Register by the Privacy Act of 1974, codified in 5 U.S.C. 552A. The publication of these mammoth documents occupied several thousand pages in the daily Federal Register in late August and early September 1975.

Descriptions of Organization and Functions. While all federal agencies apparently codify in the Code of Federal Regulations the rules of practice and procedure which they are required to publish in the Federal Register under section 522(a)(1)(C) of the Administrative Procedure Act,[63] less than one-half of the agencies codify in similar fashion the descriptions of their organization and functions which they are required to publish in the Federal Register under sections 552(a)(1)(A) and (B). Those agencies whose descriptive statements are not found in the Code of Federal Regulations merely publish them and any amendments thereto as public notices in the Notices section of the daily Federal Register. Among the more important agencies included in this category are the Agricultural Marketing Service, the Food and Nutrition Service and the Commodity Credit Corporation in the Department of Agriculture, the Domestic and International Business Administration and the Maritime Administration in the Department of Commerce, the Consumer Product Safety Commission, the Social Security Administration in the Department of Health, Education and Welfare, the Federal Maritime Commission, the Bureau of Land Management, the Mining Enforcement and Safety Administration and the Bureau of Indian Affairs in the Department of the Interior, the Wages and Hours Division and the Occupational Safety and Health Administration in the Department of Labor, the Federal Aviation Administration and Office of Pipeline Safety in the Department of Transportation, the Federal Trade Commission, the Interstate Commerce Commission, and the National Labor Relations Board. Occasionally, the published regulations in the Code for an agency will refer the interested reader to the Notices section of the Federal Register to locate the agency's description of its organization and functions,[64] but in most cases the material preserved by the agency in the Code of Federal Regulations is completely uninformative on the agency's structure and proceedings.

This practice, while apparently legal,[65] makes this important material practically inaccessible within the Federal Register System. The searcher must check the annual index for the daily Federal Register for each year since the agency's establishment and then himself arrange or codify the still operative documents to obtain a composite picture. The descriptions published annually by each agency in the Government Manual (formerly the Government Organization Manual) are not an adequate substitute for this hidden material because those descriptions are intended to serve as summaries or digests and do not have the force and effect of law. Documents describing an agency's structure and functions and the delegated authority exercised by its various component parts have general applicability and legal effect (i.e. the agency cannot disregard these provisions and operate in a contrary fashion) and therefore qualify for codification in the Code of Federal Regulations under section 10 of the Federal Register Act.[66] The Administrative Committee of the Federal Register should therefore act to require their codification and preservation.[67] While it is possible that an individual agency's structure and delegations of authority may change quite rapidly and that any codification in the Code of Federal Regulations may quickly become dated, researchers know that each Code volume is revised as of the cut off date on its cover and that subsequent changes in the regulations can only be discovered in the list of "C.F.R. Sections Affected" in the annual, quarterly, monthly and daily indexes of the Federal Register. That search, however, is a manageable one that can be done in any library that maintains the current Federal Register.

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[63] Agency regulations implementing the Freedom of Information Act are also generally preserved in the Code of Federal Regulations.

[64] See, e.g., 7 CFR 295.2 (1975). "The description of the central and field organization of the Food and Nutrition Service is published as a notice in the Federal Register and may be revised from time to time." The Food and Nutrition Service administers the Food Stamp and National School Lunch programs. The Agriculture Marketing Service supplies in addition in its codified regulations a citation to the Federal Register of August 15, 1967 for a description of its organization and functions. 7 CFR 900.500 (1975).

[65] Sections 552(a)(1)(A) and (B) require only Federal Register publication of these documents and not their codification in the Code of Federal Regulation. *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir. 1969).

The quality of the descriptions of organization and functions that are codified in the Code of Federal Regulations varies greatly from one agency to another. Some agencies, such as the Federal Communications Commission, Federal Power Commission, Federal Home Loan Bank Board, Securities Exchange Commission, and the Farmers Home Administration in the Department of Agriculture, are particularly conscientious and thorough in performing this informational task. The reader of these agencies' regulations can quickly determine the agency's statutory authority, its various offices or bureaus and their respective functions and locations, and the types of proceedings conducted by the agency. Ideally, in the course of doing so the reader should also discover the various "methods whereby the public may obtain information, make submittals or requests, or obtain decisions" which the agency is required to publish as part of its descriptive statement by section 552(a)(1)(A) of the Administrative Procedure Act. It is hard to judge how well agencies perform this difficult task for such a diverse readership, but a cursory reading of the Code of Federal Regulations indicates that some agencies such as the Federal Communications Commission and Federal Power Commission have made a genuine effort to inform the lay public of their activities and processes and have been reasonably successful in doing so. However, the descriptions of organization and functions codified by a significant number of agencies are so sketchy and incomplete that they have little informational value. The Statement of Organization and General Information published in the Code of Federal Regulations by the Environmental Protection Agency, for instance, tells the reader very little about what that important agency does. Examples of other agencies that publish barebones descriptions include the Federal Deposit Insurance Corporation, the Coast Guard in the Department of Transportation, the Renegotiation Board in the Department of Defense, and the United States Fish and Wildlife Service in the Department of the Interior. It is important that all agencies review their descriptive statements to insure that they adequately inform the public of the agency's organization and functions.

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[66] See the discussion in text at nn.46–49.

[67] The Administrative Committee presently has authority under the regulations to enter into a written agreement with an agency for the publication in the Code of a description of the agency's organization if the description is kept current and if publication in the Code is "necessary or desirable for the effective discharge of the agency's functions or activities." 1 CFR 21.4 (1975). Paragraph A of the Recommendation adopts the approach that publication is desirable in all instances.

Concise General Statements of Basis and Purpose. The preambles published in the Federal Register to accompany newly promulgated rules have not normally been preserved in the Code of Federal Regulations despite the importance of this portion of a rule's administrative history. The preamble contains the agency's concise general statement of the new rule's basis and purpose that is required by section 553(c) of the Administrative Procedure Act to be "incorporate[d]" into the rule. Preambles must also conform with the regulations of the Administrative Committee of the Federal Register,[68] but except on matters of format and intelligibility there is no indication that those regulations were intended to require the publication of anything different than is already required to be published by section 553(c).[69] Unlike a report of a legislative committee, the agency's "basis and purpose statement" is essential to the validity of the rule [70] and should normally be treated as part of it.

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[68] The regulations are in Part 18 of 1 CFR on the Preparation and Transmittal of Documents Generally. The principal provision of preambles is in 1 CFR 18.12 (1975). It reads as follows:

> §18.12 *Preamble requirements.*
>
> Each notice of proposed rule making and final rule making document shall conform to the following:
>
> (a) There must be a clear preamble statement that describes the contents of the document in a manner sufficient to apprise a reader, who is not an expert in the subject area, of the general subject matter of the rule making document.
>
> (b) To the extent practicable, the preamble statement for a proposed rule making document should also discuss the major issues involved in, and the reasons for, the proposed rules.
>
> (c) To the extent practicable, the preamble statement for a rule or regulation that was preceded by a notice of proposed rule making, should also indicate in general terms the principal differences, if any, between the rules as proposed and the rules as adopted.

There is no authority that this regulation is judicially enforceable and no evidence that it was intended to be.

[69] The preamble requirement in 1 CFR 18.12(a) (1975), however, applies to all "rules" and not just to rules that are subject to the rule making provisions in sections 553(b)–(c). The coverage of the regulation is therefore significantly broader since it applies to interpretative rules, policy statements and other rules that are exempt from sections 553(b)–(c). Paragraph B of the Recommendation covers only those statements of basis and purpose which the statute requires to be incorporated into the rule.

[70] *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 701 (2d Cir. 1975); *Automotive Parts and Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

The Office of the Federal Register is presently experimenting with the inclusion of these statements in the Code of Federal Regulations by printing the preambles that accompanied the enactment of the rules of the Cost Accounting Standards Board as Appendices to the regulations of that agency codified in Chapter III of Title IV, an otherwise thin title of the Code on the subject of Accounts. The preambles appear as originally published in the daily Federal Register, and editorial notes indicate the language of the regulation or amendment to which each preamble refers.

The chief obstacle to expanding this practice to include the regulations of other agencies appears to be its adverse effect on the bulk and orderliness of the Code of Federal Regulations. The advantages, however, are likely to outweigh the costs in many instances. Certainly a well-drafted concise general statement of a rule's basis and purpose can make a complex and technical rule more intelligible to the casual or potentially affected reader as well as to a reviewing court.[71] Such is the case with respect to statements prepared by the National Highway Traffic Safety Administration to accompany newly enacted federal motor vehicle safety standards and amendments thereto. A survey of a sample of these statements indicates that they are generally worth preserving because they concisely summarize what the agency intends to accomplish with its rule and thus make more intelligible regulations that are often expressed in mathematical or technical terms.[72] A similar survey of statements prepared by the Environmental Protection Agency to accompany effluent guidelines and standards promulgated under the Federal Water Pollution Control Act and performance standards for new stationary sources promulgated under the Clean Air Act raises some doubt about the utility of preserving these statements in the Code of Federal Regulations in the same form in which they are published in the Federal Register. The statements in the sample concentrate on responding to the comments received on the proposed rule and on citing the studies and literature that provide the record factual basis for the rule as promulgated.[73] This emphasis on the agency's response to comments is consistent with case law interpreting section 553(c) [74] but it diminishes the permanent value of the statements because a string of responses to comments of varying and sometimes passing importance does not afford the reader a quick overview of what the agency intends to accomplish with its rule. The statements do indicate any differences between the proposed and the final rule, but in most instances the reader interested in understanding what the Environmental Protection Agency intends to accomplish in promulgating the rule will find it necessary to do further research by writing for the cited documents or by reading in the daily Federal Register the notice of proposed rule making. The complexity of the subject matter covered by these rules may preclude conciseness and diminish the utility of any statements that are preserved in the already swollen Title 40 (Protection of the Environment) in the Code of Federal Regulations. Despite these limitations, which may also affect other agencies, it seems desirable to continue the experiment begun by the Office of the Federal Register by expanding it to include additional agencies. All agencies should consider preserving in the Code of Federal Regulations the statements of basis and purpose (or portions thereof) that they are required by section 553(c) to incorporate into newly promulgated rules. The format for doing so may well vary from agency to agency and often will require more effort than merely reproducing verbatim the document that appeared in the Federal Register. Editing or deleting material may be necessary, or incorporating material from the notice of proposed rule making.

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[71] The "basis and purpose statement" required by section 553(b) of the Administrative Procedure Act must be sufficiently detailed and informative to permit searching judicial scrutiny of how and why the regulations were actually adopted. *Amoco Oil Co. v. EPA*, 501 F.2d 722, 739 (D.C. Cir. 1974).

[72] For two recent examples, see 40 FR 12088 (March 17, 1975) (amendment to brake hose standard); 40 FR 2989 (January 17, 1975) (amendment to emergency air brake systems standard).

[73] For some recent examples, see 40 FR 2804 (January 16, 1975) (effluent guidelines and standards for timber products processing); 40 FR 2650 (January 14, 1975) (same for fertilizer manufacturing).

[74] "The basis and purpose statement is not intended to be an abstract explanation addressed to imaginary complaints. Rather, its purpose is at least in part, to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Rodway v. United States Dept. of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975).

These editorial difficulties will increase over time as an agency preserves more and more statements of basis and purpose in the Code. A regulation may be amended several times and statements that refer to former texts may become confusing. Editing or discontinuing outdated statements and adding explanatory passages to new ones may alleviate this problem, but an agency may prefer as an alternative to publish in each year's Code of Federal Regulations the complete texts of all statements issued by the agency during the preceding year. Each agency's statements could be grouped together at the end of the title or chapter assigned to the agency in the Code or could be published in a special Code volume with statements from other agencies. If this alternative is adopted, each statement appears only once in the Code of Federal Regulations. Subsequent editions to the Code reprint only the text of the regulation but should supply following the regulation not only the Federal Register citation to the document promulgating the rule (as is presently done) but also the citation to the Code volume reprinting the statement of basis and purpose. This alternative permits subscribers to the Code of Federal Regulations to preserve the statements of basis and purpose in a convenient bound form without requiring the annual reprinting of all past statements. Persons who subscribe to the entire Code would prefer that the statements be grouped together annually into one or two special volumes so that they need not save the entire Code each year, while subscribers to a single volume in their special area of interest would prefer that the statements be published annually in that volume so that they need not purchase an additional Code volume. The Administrative Committee of the Federal Register will have to accommodate these competing interests. It may prove feasible to do so by publishing the statements annually in both formats.

IV. Publication in the Federal Register of Interpretations of General Applicability and Statements of General Policy

(Paragraph B of the Recommendation)

Courts, agencies and commentators have long wrestled with the distinction between legislative or substantive rules on the one hand and interpretations and policy statements on the other hand. While these distinctions are important, it must be remembered that legislative rules, interpretations and policy statements that have prospective effect are all "rules" under the Administrative Procedure Act. Section 551(4) of the Administrative Procedure Act defines "rule" to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." That definition is broad enough to encompass legislative rules, interpretative rules, and policy statements; it excludes only the retroactive application of law or policy in an adjudication.[75] While the Administrative Conference has approved Resolution No. 1 of the American Bar Association which would amend section 551(4) to eliminate agency statements of particular applicability from the definition of "rule," [76] the approach of this Recommendation is nevertheless consistent with the proposed narrower definition because it only requires the publication in the Federal Register of rules that have general applicability.

The adoption by an agency of an interpretative rule or policy statement therefore constitutes rule making, but section 553(b)(A) of the Administrative Procedure Act expressly exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from the notice and comment requirements otherwise applicable to rule making. The provisions in what are now sections 553(b)–(c) that require an agency to afford notice of a proposed rule and the opportunity for comment thus only apply "to substantive rules issued pursuant to statutory authority." [77] Section 553(d)(1) likewise exempts "interpretative rules and statements of policy" from the pre-effective publication requirement contained in that section 553(d). Efforts by private parties to invalidate agency pronouncements on the ground that they are in reality legislative or substantive rules not properly promulgated under sections 553(b)–(d) have therefore forced courts to struggle to define the exempted categories of interpretative and procedural rules and statements of policy. In *Pickus v. United States Board of Parole,*[78] for example, the court held that the Board's rules on parole eligibility (which had been published in the Federal Register but without any advance notice or opportunity to comment) were neither general statements of policy nor interpretative or procedural rules and had therefore been invalidly promulgated. Likewise, in *Gardiner v. Tarr,*[79] the court held that the Selective Service Director's letter to all state directors and temporary instruction on the order of call were substantive rules required to be promulgated in accordance with section 553(b)–(d) notwithstanding the contrary labels attached to them by the agency. While the Administrative Conference has not yet taken a formal position on the exemptions in section 553(b)(A) and section 553(d)(1) for interpretative rules and general statements of policy, a memorandum prepared by a consultant in 1971 for the Committee on Rule Making and Public Information tentatively concluded that the current exemptions are probably justified.[80]

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[75] *NLRB v. Wyman-Gordon*, 394 U.S. 759, 765–766 (1969) (plurality opinion).

[76] Statement of the Administrative Conference on ABA Resolution No. 1 Proposing to Amend the Definition of "Rule" in the Administrative Procedure Act, 3 ACUS *Recommendations and Reports* 59 (1973).

[77] *Attorney General's Manual on the Administrative Procedure Act* 30 (1947).

The distinction between legislative or substantive rules and interpretative rules and policy statements, which is so significant for the rule making section of the Administrative Procedure Act (section 553), is of little or no importance under the public information section (section 552). Section 552(a)(1)(D) requires each agency to separately state and currently publish in the Federal Register for the guidance of the public not only its "substantive rules of general applicability adopted as authorized by law" but also "statements of general policy or interpretations of general applicability formulated and adopted by the agency." Likewise, sections 552(a)(2)(A)–(C) require each agency to make available for public inspection and copying and to index its final opinions in the adjudication of cases and its administrative staff manuals and instructions to its staff that affect a member of the public as well as "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." This "publicity" requirement logically applies to policy statements and interpretations of particular applicability that are not required to be published in the Federal Register under section 552(a)(1)(D) which only requires the publication of rules that have general applicability.[81]

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[78] 507 F.2d 1107 (D.C. Cir. 1974).

[79] 341 F.Supp. 422 (D.C.D.C. 1972).

[80] Bonfield, Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the A.P.A., 23 *Ad. Law Rev.* 101 (1971). Another consultant, Professor Michael Asimow of the U.C.L.A. School of Law, is preparing an additional study on this issue for the Committee on Rule Making and Public Information of the Administrative Conference.

Of course, nothing in the Administrative Procedure Act precludes an agency from voluntarily employing notice and comment procedures in promulgating interpretative rules of general applicability or statements of general policy. The Securities Exchange Commission has done so for interpretative releases, see e.g., Notice of Proposed Interpretation under Investment Company Act of 1940 in 40 FR 18467 (April 28, 1975); and the Federal Communications Commission recently published a proposed policy statement in the Proposed Rules section of the Federal Register, see Proposed Policy Statement re Agreements Between Broadcast Licensees and the Public, 40 FR 25689 (June 18, 1975). The latter proposal could just as well have been designated a proposed rule, but the Commission apparently wanted to give its new policy considerable retroactive effect by applying it to pending adjudications, which might not have been possible if it had been adopted in the form of a legislative regulation.

Present Publication Practices. The number of interpretations of general applicability and general statements of policy that appear in the Federal Register is surprisingly small when compared with the great quantity of substantive rules. The exact number is difficult to determine because interpretative rules and policy statements are not separately indexed. The number of general statements of policy published ordinarily does not exceed twenty or thirty per month. The Civil Aeronautics Board, Food and Drug Administration, and Federal Power Commission have distinct parts in the Code of Federal Regulations reserved for the codification of policy statements, but those agencies issue on the average only two or three new statements each year through publication in the Federal Register. The Immigration and Naturalization Service recently published its first policy statement discoverable in the Federal Register.[82] That statement terminated a prior unpublished policy that seemingly conflicted with a published regulation.

The number of interpretative rules published in the Federal Register is considerably greater. Several major agencies such as the Equal Employment Opportunity Commission and the Fair Labor Standards Administration lack statutory authority in many important areas to issue binding legislative rules and have chosen to regulate through the issuance of interpretative rules. The Federal Trade Commission, in addition, formerly published a significant number of interpretative industry guides and trade practice rules because its authority to issue legislative rules was unclear. A recent court decision [83] and new legislation [84] have now clarified the Commission's power to promulgate substantive trade regulation rules and the Commission's rule making now takes that form.[85] The format, comprehensiveness and detail of interpretative rules issued by the Federal Trade Commission and other agencies that lack full rule making powers often make their published regulations indistinguishable in appearance from legislative regulations. Interpretative regulations differ from legislative ones primarily because they only interpret the statute and do not bind those persons subject to their terms. Reviewing courts may also exercise independent judgment on the correctness or desirability of an interpretative rule while in reviewing a legislative rule a court is limited to questions of legal validity.[86] However, the wider scope of judicial review available when a rule is an interpretative one is a distinction of diminishing importance. The Second Circuit now tells us that "if the administrative process is to be practically effective, specific regulations promulgated pursuant to a general statutory delegation of authority must be treated as authoritative, whether labelled "substantive" or "interpretative," especially in areas where the agency possesses expertise not shared by the courts." [87] The Supreme Court has also recently treated as authoritative (or at least entitled to great deference) the Equal Employment Opportunity Commission's interpretative regulations for determining job-relatedness of employment tests.[88]

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[81] M. Asimow, *Advice to the Public from Federal Administrative Agencies* 82–3 (1973).

[82] 39 FR 40311 (November 19, 1974).

[83] *National Petroleum Refiners Ass'n. v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

[84] Federal Trade Commission Improvement Act, 88 Stat. 2183.

[85] See proposed trade regulation rule on food advertising, 39 FR 39841 (Nov. 11, 1974).

[86] K. Davis 1 *Administrative Law Treatise* §5.03 at 304 (1958).

The Securities and Exchange Commission is the only major agency with substantive rule making powers that regularly publishes in the Federal Register interpretative releases under the various acts which it administers. The releases appear in the daily Federal Register and are then listed but not reprinted in the Code of Federal Regulations. The Occupational Safety and Health Administration (OSHA) in the Department of Labor, on the other hand, is an example of an agency that releases a considerable volume of important interpretative material that does not appear in the Federal Register. Since its inception in 1970, OSHA has promulgated a large number of occupational safety and health standards. Many of these standards are national consensus standards originally formulated by private standard setting organizations and adopted by OSHA on an interim basis. The language of these standards is often illsuited for binding, legally enforceable rules and requires considerable clarification and interpretation. The task of promulgating permanent standards has proved to be a slow one, as has the process of amending existing standards or granting variances thereto.[89] This regulatory gap has been filled in part by the issuance of Field Information Memoranda containing instructions to the agency's enforcement staff and of Program Directives clarifying to the benefit of the public interpretative difficulties that have arisen in the field. Field Information Memoranda often instruct enforcement personnel on the agency's interpretation of a standard and on occasion indicate that the agency's interpretation will soon apppear in the form of a proposed revision of the standard.[90] The Memoranda become part of the Department of Labor's Field Organization Manual and are usually issued in the form of amendments to the Manual. Interpretations, on the other hand, are rendered on request by OSHA Assistant Regional Directors and by the

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[87] *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 696 (2d Cir. 1975).

[88] *Abermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

[89] Morey, Mandatory Occupational Safety and Health Standards — Some Legal Problems, 38 *Law and Contemporary Problems* 584, 595 (1974); Page and Munsing, Occupational Health and the Federal Government: The Wages are Still Bitter, *id.* at 677.

[90] See Field Information Memorandum 75–26, interpreting 29 C.F.R. 1910.107(b)(5)(iv) and 1910.107(f)(1) on automatic fire extinguishing system.

National Office in cases of national significance.[91] An interpretation is defined as an "explanation of standards and their workplace application, addressing scope and limitations and any other questions which may arise regarding application to situations. *Interpretations are not intended to change, modify, or supersede standards.*" [92] The more important of the interpretations adopted by the National Office are issued in the form of Program Directives in the #100 Series. The National Office is to assure the "wide distribution" of these Program Directives,[93] but the Program Directives as well as the Field Information Memoranda are not published in the daily Federal Register. The Program Directive establishing the present interpretative service has also not been published in the Federal Register even though its publication is seemingly required by section 552(a)(1)(B) of the Administrative Procedure Act because it is one of the methods by which the agency's functions are channelled and one of the informal procedures made available by the agency.

The paucity of interpretative rules of general applicability and general statements of policy published in the Federal Register is only partially attributable to the failure of agencies to publish those interpretations or policy statements adopted by them in rule making proceedings. It is also attributable to the reliance by many agencies on adjudication for policy formulation. Agencies, with one major exception, have taken advantage of the Attorney General's interpretation of what are now sections 552(a)(1) and (2) of the Administrative Procedure Act that "an agency is not required under subsection (a) to publish in the Federal Register the rules, policies, and interpretations formulated and adopted in its published decisions. Instead, this 'case law' is to be 'made available under subsection (b)'." [94] The major exception to the prevailing approach is the Federal Trade Commission which publishes the texts of its cease and desist orders (both contested and adjudicated) in the Rules and Regulations section of the Federal Register and then digests the orders (chronologically without reprinting their texts) in the Code of Federal Regulations. The Commission also publishes in the Federal Register and in the Code of Federal Regulations the texts of the Commission's Administrative Opinions and Rulings of an advisory nature, but the number of these advisory opinions issued by the Commission in recent years has greatly declined. Other agencies, such as the National Labor Relations Board, which articulate law and policy primarily through adjudication publish practically nothing in the Federal Register and the Code of

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[91] OSHA Program Directive #100–1 (March 10, 1975), CCH *Employment Safety and Health Guide* ¶9736 and ¶9858.

[92] *Id.* (emphasis in original).

[93] *Id.*

[94] *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 10 (1967) (quoting Housing Report at 7).

Federal Regulations except for their procedural rules, employee standards of conduct, and FOIA regulations.

Professor Davis forcefully attacks the Attorney General's interpretation of the publication requirements and argues that at least some adjudicatory opinions (e.g., the Labor Board's adoption of a three year contract bar rule in the *General Cable* case,[95] actually contain interpretations of general applicability or statements of general policy that must be published in the Federal Register under section 555(a)(1)(D).[96] Attorney General Ramsey Clark had argued that a rule, interpretation or policy adopted in an adjudicatory opinion cannot have general applicability and therefore cannot be subject to the publication requirements in what is now section 552(a)(1)(D).[97] In *NLRB v. Bell Aerospace Co.*[98] an unanimous Court adopted an approach similar to that of the Attorney General by indicating that an adjudicatory opinion may contain "new principles" but not a "general" rule or "general standards." [99] The Court by implication also agreed with Professor Davis that if an adjudicatory opinion in fact contains generalized rules, then those rules have been improperly promulgated. In *NLRB v. Wyman-Gordon Co.*,[100] a plurality of four Justices had stated in dictum that a policy adopted in an adjudicatory opinion that applied only to future adjudications was an improperly promulgated rule.

Bell Aerospace, however, indicates that an agency may announce "new principles" in an adjudicatory opinion that are somehow different from "general rules." The distinction between these two categories of pronouncements is not made clear in the opinion, but the reasoning may be that new principles which are applied in an adjudication lack future effect (and are therefore not rules under the definition of "rule" in section 551(4)) or have only particular applicability to the parties to the adjudication and are therefore rules but exempt from the publication requirements in section 552(a)(1) and from most of the rule making requirements in section 553(b)–(d). Neither line of reasoning is particularly persuasive because, as the *Bell Aerospace* Court itself recognized, "adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies . . . [that] generally provide a guide to action that the agency may be expected to take in future cases." [101] Stare decisis therefore operates to afford new principles adopted by an agency in an adjudicatory opinion at least some degree of general applicability and future effect. No doubt the general applicability and future effect of a legislative rule which is not limited to named parties is more certain because valid legislative rules have the force and effect of law. However, interpretative rules of general applicability and general statements of policy adopted by an agency in rule making proceedings also lack legal effect but do provide a guide to action that the agency may take in subsequent adjudicatory and rule making proceedings. It would seem that new principles announced in an adjudicatory opinion may likewise have general applicability and future effect because they provide a guide to future agency action. The requirement for a rule is one of "future" and not of "legal" effect.

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[95] *General Cable Corp.*, 139 N.L.R.B. 1123 (1962).

[96] K. Davis, *Administrative Law Treatise* 126–127 (1970 Supp.).

[97] *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 10 (1967).

[98] 416 U.S. 267 (1974).

[99] *Id.* at 293–294.

[100] 394 U.S. 759 (1969).

[101] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (quoting plurality opinion in *Wyman-Gordon*).

Agency policies articulated in adjudicatory opinions and staff manuals that are not presently published in the Federal Register are at least available for public inspection and copying and indexed in accordance with the provision of section 552(a)(2) of the Administrative Procedure Act. Case law and staff manuals are therefore accessible to the public [102] and do not constitute a body of secret law. A matter of potentially greater concern is that the limited number of interpretations of general applicability and general statements of policy published in the Federal Register may reflect the failure of agencies to articulate policy at all in many important areas. The Administrative Conference has already recognized the importance of articulated policies to inform and guide the public. Recommendation 71–3 on Articulation of Agency Policies provides that each agency should "as far as feasible in the circumstances, state the standards that will guide its determinations in various types of agency action, either through published decisions, general rules or policy statements other than rules." [103] The recommendation did not take a position on when there should be public participation in policy formulation through the use of notice and comment rule making. In the context of policy making by the Securities and Exchange Commission on when sales of unregistered securities violate section 4 of the Securities Act of 1933, the Conference has recommended that interpretative releases and general statements of policy issued without opportunity for public participation should only be utilized when notice and comment procedures would not be beneficial or feasible.[104] The Committee on Rule Making and Public Information is presently reviewing the desirability of the statutory provision which exempts interpretative rules and policy statements from the procedures required for informal rule making.[105] There is no question, however, that in many situations rules in the form of interpretations of general applicability or statements of general policy are appropriate devices for policy articulation. An agency may employ notice and comment procedures if it believes public participation is desirable in promulgating an interpretative rule or policy statement.[106] The discussion of the case law which follows also indicates that there are situations where interpretations of general applicability and statements of general policy may appropriately be adopted by an agency without any opportunity for public participation.

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[102] The two leading cases on the availability of staff manuals under the Freedom of Information Act are *Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973), and *Hawkes v. Internal Revenue Service*, 467 F.2d 787 (6th Cir. 1972), upheld after remand, 507 F.2d 481 (6th Cir. 1974).

[103] 2 ACUS *Recommendations and Report* 24. The reference to "rules" in the text of the Recommendation apparently encompasses only legislative rules. As indicated above in text at n.75, policy statements that have future effect are rules under the definition of "rule" in Section 551(4) of the Administrative Procedure Act.

[104] Recommendation 19 on SEC No Action Letters, 1 ACUS *Recommendations and Reports* 34.

[105] See n.80 *supra*.

Definition of Interpretation of General Applicability. The most frequently quoted definition of an interpretative rule appears in *Gibson Wine Co. v. Snyder:*

> Generally speaking, it seems to be established that "regulations, substantive rules and legislative rules" are those which create law, usually implementary to an existing law, whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.[107]

Interpretative rules therefore clarify or interpret statutes or other rules. Perhaps the most distinctive feature of an interpretative rule is its lack of binding effect in subsequent administrative and judicial proceedings. Both the validity and the correctness of an interpretative rule are subject to further challenge, although a reviewing court usually gives considerable weight to an agency's interpretation of its operative statute [108] or of its own regulations.[109] In *National Ass'n of Insurance Agencies v. Board of Governors of the Federal Reserve System,*[110] for example, the court categorized the Board's statement on the range of insurance activities permissible for one bank holding companies as an unreviewable interpretative rule but made clear that the aggrieved insurance agents could direct "particularized challenges" to the merits of the Board's interpretation in pending application proceedings initiated by bank holding companies. For a similar holding involving the same agency, see *American Bancorporation, Inc. v. Board of Governors of Federal Reserve System.*[111] In *Insurance Agents* the Board's statement had interpreted the Board's previously promulgated regulation on permissible insurance activities; and the statement itself was published in the Federal Register [112] and codified in the Code of Federal Regulations.[113] The interpretative rule in *American Bancorporation,* on the other hand, took the form of an amendment to an existing regulation on the acquisition by bank holding companies of companies engaged in advising state and local governments in financial matters; and the amendment itself was likewise published in the Federal Register and codified in the Code of Federal Regulations.[114] In both instances, therefore, the Board's new or amended rule was published in the Federal Register in accordance with section 552(a)(1)(D) but the Board did not afford public notice or opportunity to comment under sections 553(b)–(c) prior to promulgating the rule.

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[106] See n.80 *supra.*

[107] 194 F.2d 329, 331 (D.C. Cir. 1952).

[108] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See also text at nn.87–88, *supra.*

[109] *Udall v. Tallman,* 380 U.S. 1 (1965).

[110] 489 F.2d 1268 (D.C. Cir. 1974).

[111] 509 F.2d 29 (8th Cir. 1974).

[112] 37 FR 18520 (September 12, 1972).

[113] 12 CFR 225.128.

[114] 12 CFR 225.4(a)(5).

The Board's utilization of an interpretative rule appears justifiable in both instances. In *Insurance Agents*, the Board had already engaged in notice and comment rule making on permissible insurance activities for bank holding companies and the Board's statement, couched in language such as "the Board will generally regard," simply gave the Board's present views on interpretative difficulties that had arisen in applying the existing regulation to particular fact patterns. While the amendment in the *American Bancorporation* case is more substantive in appearance, the court characterized the agency's narrowed view of the language of the original regulation as making "explicit what was implicit under the regulation." [115] Most likely the agency could have found under section 553(b)(B) that notice and comment procedures were "unnecessary" if the amendment had not already fallen within the exemption for interpretative rules.

A more questionable use of an interpretative rule issued without opportunity for public participation occurred in *Eastern Kentucky Welfare Right Organization v. Simon.*[116] The court there upheld on the merits Revenue Ruling 69–545 which allowed private non-profit hospitals to qualify as tax exempt charitable organizations under section 501(c)(3) of the Internal Revenue Code without requiring them to provide free or below cost treatment (except in emergency rooms) for individuals unable to pay for such services. The Commissioner had promulgated Revenue Ruling 69–545 without affording any public notice or opportunity for comment. The ruling, like other Revenue Rulings, was not published in the Federal Register. The court upheld the Commissioner's interpretation of the term "charitable" in section 501(c)(3) and excused his noncompliance with sections 553(b)–(d) of the Administrative Procedure Act because the Revenue Ruling was an interpretative ruling with no independent binding effect on the courts unless "they choose to accept it as a proper interpretation of the meaning of the word 'charitable.' " [117] Notice and comment rule making proceedings nevertheless appear strongly desirable for the promulgation of the policy articulated in Revenue Ruling 69–545 because that Ruling has a significant impact on the availability of hospital services for the poor and because the Internal Revenue Service is not an expert in health care delivery needs but needs to be educated in that area.[118]

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[115] 509 F.2d at 34.

[116] 506 F.2d 1278 (D.C. Cir. 1974), cert. granted 95 S.Ct. 1974 (1975).

[117] 506 F.2d at 1290.

[118] 506 F.2d 1291–92 (Wright J., dissenting).

Definition of General Statement of Policy. The Attorney General's Manual on the Administrative Procedure Act defined general statements of policy to mean "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." [119] Once again the distinctive feature of a general statement of policy is its lack of binding effect. In *Pacific Gas and Electric Co. v. FPC*,[120] the Court of Appeals for the District of Columbia recently described a general statement of policy as follows:

> A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but it is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. . . . It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rule by announcing binding precedent in the form of a general statement of policy.[121]

In *Pacific Gas & Electric*, the Federal Power Commission had promulgated, without prior notice or opportunity for comment, a "Statement of Policy" expressing its views on curtailment priorities in pipeline sales of natural gas necessitated by the natural gas shortage. The Statement of Policy was published in the Federal Register [122] and duly codified in the Code of Federal Regulations [123] with the Commission's previously issued Statements of Policy. The effect of the statement was to inform the public of the types of curtailment plans submitted by pipeline companies that would receive "initial and tentative FPC approval," but there was "no assurance" that any such plan would be finally approved.[124] No doubt the Statement of Policy facilitated private planning by pipeline companies and affected natural gas users by indicating what types of curtailment plans the Commission was likely to approve. At the same time it did not restrict or bind the Commission in advance as would the more rigid format of a legislative rule. Under these circumstances the prompt issuance without opportunity for public participation of a tentative rule in the form of a general statement of policy seems justifiable.

In *Lewis-Mota v. Secretary of Labor*,[125] the Second Circuit held that a legislative or substantive rule, as opposed to a general statement of policy, "changes existing rights and obligations." Thus, the Secretary of Labor's directive suspending the precertification list that exempted aliens in listed occupations destined for listed geographic areas from the requirement of showing a specific job offer was a legislative rule because it required for the first time aliens in the affected classes to submit proof of specific job offers as well as statements of their qualifications in order to obtain permanent resident visas. The directive was therefore improperly promulgated because no other exemption from the rulemaking provisions in sections 553(b)–(d) of the Administrative Procedure Act was applicable and because the Secretary had not afforded public notice, opportunity for comment and pre-effective publication as required by those sections for substantive rules. In *Texaco Inc. v. FPC*,[126] the Third Circuit similarly held that a Federal Power Commission order establishing compound interest rates on refunds was a legislative rule affecting legal obligations and not a general statement of policy.

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[119] *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947).

[120] 506 F.2d 33 (1974).

[121] *Id.* at 38–39 (footnotes omitted).

[122] 38 FR 2171 (January 22, 1973).

[123] 18 CFR 2.78 (1975).

[124] 506 F.2d at 40.

[125] 469 F.2d 478, 482 (2d Cir. 1972).

The Court of Appeals for the District of Columbia Circuit in *Pickus v. United States Board of Parole* [127] restricted even further the legitimate role for general statements of policy by holding that agency action cannot take the form of a general statement of policy "if it substantially affects the rights of persons subject to agency regulations." Since the Board's parole eligibility rules were of the "kind calculated to have a substantial effect on ultimate parole decisions," they were not general statements of policy but legislative rules subject to the notice and comment procedures in sections 553(b)–(c).[128] The exemption for interpretative rules did not apply because the eligibility rules did not contain interpretations but "self-imposed controls" on the Board's exercise of its powers.[129] Likewise, the exemption for rules of agency practice and procedure did not apply because "that exemption excludes from its operation action which is likely to have considerable impact on ultimate agency decisions." [130]

The Secretary of Labor's directive in *Lewis-Mota* suspending the precertification list for alien workers was not only promulgated without any opportunity for public participation but was also not published in the Federal Register. The Court of Appeals did not resolve the publication issue because it held that notice and comment rule making was required; but the District Court, which had found the directive to be a general statement of policy exempt from the rule making requirements of sections 553(b)–(d), held that the directive was required to be published in the Federal Register under section 551(a)(1)(A).[131] Surprisingly, the District Court did not refer to the publication requirement in paragraph

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[126] 412 F.2d 740 (3rd Cir. 1969).

[127] 507 F.2d 1107 (D.C. Cir. 1974).

[128] *Id.* at 1112.

[129] *Id.* at 1113.

[130] *Id.* at 1114.

[131] *Lewis-Mota v. Secretary of Labor*, 337 F. Supp. 1289 (S.D.N.Y.), rev'd on other grounds, 469 F.2d 478 (2d Cir. 1972).

D of section 551(a)(1) applicable to statements of general policy but only to the publication requirement in paragraph A which relates to descriptions of agency organization and methods and which appears inapplicable to the case at hand. The District Court also held that *Lewis-Mota* and other alien applicants for permanent resident visas in the relevant class had received "actual and timely notice of the terms" of the directive when the Immigration and Naturalization Service notified them in writing of the suspension of the precertification list. The "sanction" in the concluding paragraph of section 552(a)(1) that no person "be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published" was therefore inapplicable. The District Court's holding on the timeliness of the actual notice is very questionable because the actual notice came long after the promulgation of the directive and delayed efforts by the affected aliens to solicit job offers.

Another more serious problem on the application of any sanction for the non-publication in the Federal Register of statements of general policy derives from the non-binding effect of such statements. In *Airport Commission of Forsyth County v. CAB*,[132] the Civil Aeronautics Board and the Federal Aviation Administration had issued but had not published in the Federal Register a joint press release favoring single airports for adjacent communities. In a subsequent adjudicatory proceeding the Board ordered consolidated service at a single airport for a tri-city area in North Carolina. An airport aggrieved by the consolidation challenged the order as based on an unpublished general statement policy. The court assumed that the press release was a general statement of policy required to be published in the Federal Register but held that the airport suffered no injury from the non-publication since it was not "required to resort to" and was not "adversely affected by" the unpublished press release. The Board's policy statement or pronouncement did not operate in and of itself to create or deny any rights because the Board did not attempt to apply the policy statement as a rule of law but based its decision on "substantial and extensive record evidence." [133] While the court's approach is consistent with the reasoning in *Pacific Gas & Electric* that the agency in adjudicatory and rule making proceedings must be prepared to establish any policy announced in a prior policy statement just as if the statement had never existed and never been issued, it pays too little attention to the practical impact of policy statements. An airport official unaware of the Board's general statement of policy is adversely affected in planning airport development and in preparing for adjudicatory and rule making proceedings. The problem of devising an appropriate sanction is nevertheless a real one, and it is unlikely that a court will impose any sanction for the non-publication of a general statement of policy so long as the agency does not treat the statement as a binding rule. The court in *Pesikoff v. Secretary of Labor* [134] adopted a similar approach to the non-publication of an interpretative memorandum of general applicability when it held that a private party was not adversely affected by an interpretation of a statute in an unpublished field memorandum because that memorandum could "create no law or have no effect beyond that of the statute." [135]

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[132] 300 F.2d 185 (4th Cir. 1962).

[133] *Id.* at 188.

Another approach to general statements of policy is to treat them as "rules directed primarily at the staff of an agency describing how it will conduct agency discretionary functions, while other [substantive] rules are directed primarily at the public in an effort to impose obligations on them." [136] Under this characterization, administrative staff manuals such as the Department of Labor's Field Organization Manual will contain many general statements of policy. This definitional approach is most apt where agency pesonnel in the field have broad discretionary powers to adjudicate informally; in these instances policy-makers at the top may wish to instruct or guide lower and middle level agency prsonnel on how to exercise their discretion. For example, in *Noel v. Chapman* [137] the Immigration and Naturalization Service had "instructed" its District Directors that Western Hemisphere aliens should not be routinely granted extended departure times but rather should be offered that privilege only in those cases where compelling circumstances warranted that relief. No public notice or opportunity for comment preceded the issuance of the instruction, and the instruction itself was not published in the Federal Register. The court viewed the instruction as a statement by the agency of its general policy to serve as a guideline for District Directors who still retained discretionary powers under the applicable regulation [138] to extend the time of deportation. The instruction was therefore exempt from the rulemaking provisions of sections 553(b)–(d) but not necessarily from the publication requirement of section 552(a)(1)(D). The court acknowledged the contention of the alien claimants that the statement of general policy had not been published in the Federal Register and that they had not received actual notice of it and then cited *United States v. Aarons* [139] where the Second Circuit had previously recognized that unpublished *substantive* rules could not be enforced against persons who did not have actual knowledge of them. The *Noel* court nevertheless refused, without further explanation, to afford any relief for the non-publication of the general statement of policy.

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[134] 501 F.2d 757 (D.C. Cir. 1974).

[135] *Id.* at 763 n.12.

[136] Bonfield, Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the A.P.A., 23 *Ad. L. Rev.*, 101, 115 (1971).

[137] 508 F.2d 1023 (2d Cir. 1975).

[138] 8 CFR 244.2 (1974).

[139] 310 F.2d 341 (2d Cir. 1962).

Discussion of Paragraph B of Recommendation. The above survey indicates that in many circumstances it is appropriate for an agency to articulate its policy through the adoption of interpretations of general applicability and general statements of policy. Agencies that lack substantive rule making powers have no choice but to issue interpretative rules or policy statements. Even if an agency has substantive rule making powers, it is appropriate for the agency to issue interpretative releases on matters of detail or clarification once the agency has resolved major policy issues through rule making procedures where there is an opportunity for public participation. General statements of policy, on the other hand, often involve major policy issues, but the agency's position on those issues is of a tentative or interim nature. The agency is promptly disclosing its present thinking on the matter but awaits further "education" in subsequent rule making or adjudicatory proceedings before it finally makes up its mind. Under this approach, the operative life of a general statement of policy should normally be comparatively short. Agencies may also use general statements of policy to articulate more long-term policies which they wish to guide but not to bind the agency in subsequent proceedings. For example, the Civil Aeronautics Board's longstanding "use or lose it" policy which "expects" cities awarded subsidized local carrier service to generate a minimum volume of passenger traffic appears in the Code of Federal Regulations in the form of a policy statement.[140] The question whether notice and comment procedures are desirable for this variety of rule making is separate and distinct from the question whether the ultimate rule should take the form of a legislative rule or a general statement of policy.

Where an agency articulates its policy through interpretations of general applicability or general statements of policy it is important that the public be informed of those policies. Although interpretations of general applicability and statements of general policy do not have any legal effect, they may provide the only available guidance to the public on the agency's position. Paragraph B of the Recommendation therefore provides that interpretations of general applicability and statements of general policy should be published in the Federal Register for the guidance of the public. In this way important policies that might otherwise appear only in staff manuals and other internal directives or in adjudicatory opinions will be publicly articulated in an official Federal Register document.

Paragraph B does not contemplate, however, the publication in the Federal Register of staff manuals and adjudicatory opinions but only the texts of any interpretations of general applicability and statements of general policy adopted by the agency in a staff manual or adjudicatory opinion. It reiterates what section 552(a)(1)(D) of the Administrative Procedures Act already requires but which many agencies have not fully understood or implemented. That provision requires each agency to publish in the Federal Register "statements of general policy and interpretations of general applicability *formulated* and adopted by the agency" (emphasis added). Interpretations and policy statements adopted in adjudicatory opinions and staff manuals should therefore be "formulated" into appropriate rule form for Federal Register publication. In other words, interpretations of general applicability and general statements of policy should be extracted from the opinion or staff manual and should not be published with an undifferentiated mass of other material.[141] The Rules and Regulations section is the appropriate section for publishing these documents since interpretations of general applicability and statements of general policy are by definition rules. The codification system employed in that section is also useful for indexing and locating interpretations and policy statements. Interpretations of general applicability and statements of general policy that are of continuing interest to the public should also be preserved in the Code of Federal Regulations as provided in Paragraph A of the Recommendation.

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[140] 14 CFR 399.11 (1975).

What constitutes an interpretation or policy statement of general applicability is in large part determined by the agency itself. An agency may appropriately limit an interpretation or policy statement adopted in an adjudicatory opinion to that particular adjudication. The interpretation or policy statement then has only particular applicability. The future precedential effect of the adjudicatory order does not operate to give general applicability to the interpretation or policy statement.[142] However, if an agency employs an adjudicatory proceeding to formulate policy and not just to decide the particular case, then any interpretation or policy statement adopted by the agency has general applicability and should be formulated in rule form for publication in the Federal Register. Likewise, provisions in staff manuals that merely reiterate previously articulated policies, inform agency staff of judicial or administrative decisions, or govern the internal functioning of the agency do not have general applicability. Only when an agency uses a staff manual to promulgate a new interpretation or policy that is not limited to named parties should the agency also inform the public of its new interpretation of general applicability or statement of general policy by publishing it in appropriate rule form in the Federal Register.

Agencies should not be adversely affected by the publication of additional interpretations of general applicability and statements of general policy in the Federal Register. While Federal Register publication of an interpretation or policy statement should enhance its visibility, it should not in most instances increase its impact or affect its reviewability. Agencies would continue not to be legally bound by interpretations of general applicability and general statements of policy; and direct judicial review of these types of rules will be available only if the interpretations or statements have a substantial practical impact.[143] No doubt many agencies fear that the publication of a rule in the Federal Register will somehow increase its binding effect on the agency. Case law indicates that this may occur when the agency publishes a procedural rule. An agency is not bound by an unpublished manual provision or internal agency practice but it is bound by a published procedural rule.[144] This distinction has less impact in non-procedural contexts. If an agency treats its rules as legislative rules, it should be bound by them regardless of whether or not they are published in the Federal Register.[145] On the other hand, if an agency makes plain that its rule is an interpretative one or is only a policy statement, then the agency should not be bound even if the rule is published in the Federal Register.

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[141] The Federal Highway Administration in the Department of Transportation recently published in the Federal Register lengthy portions of various federal-aid highway manuals. 40 FR 50671–50700 (October 31, 1975); 40 FR 53759–53962 (November 18, 1975). This action resulted from a court order directing the Administration to comply with the publication requirements in Section 552(a)(1). *National Wildlife Fed. v. Brinegar*, C–A No. 1269–73, (D.D.C. August 27, 1975). The undifferentiated manual material published by the Federal Highway Administration was not formulated into an appropriate Federal Register document and contained large quantities of material that was not required to be published by Section 552(a)(1).

[142] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293–294 (1974).

It must be recognized that many statements of agency objectives or plans do not qualify as interpretations of general applicability or statements of general policy that are required to be published in the Federal Register under section 552(a)(1)(D). Policy pronouncements of this type often take the form of speeches by ranking agency officials. For example, the speech by Deputy Under Secretary of the Interior William W. Lyons to the Energy Policy Conference of the Western Governors' Conference announcing that the federal government expects to lift within a year the moratorium on the leasing of federally owned coal lands is an important statement on government energy policy.[146] Likewise, speeches on antitrust policy to professional and trade associations by Federal Trade Commissioners and by the Assistant Attorney General for the Antitrust Division in the Department of Justice are considered important enough to be published in the commercial services by the Commerce Clearing House and the Bureau of National Affairs. Courts, however, have traditionally refused to treat speeches by agency members as instances of reviewable agency action but have categorized them as "unofficial expressions of views" not amounting to "decisional pronouncements." [147] Speeches are not noted in the Federal Register and it is most unlikely that a speech could qualify as a "statement of general policy . . . *formulated and adopted* by the agency" so as to require its publication under section 552(a)(1)(D) (emphasis added). It also seems undesirable to publish a notice in the Federal Register each time an agency official expresses himself on the objectives or goals he has in mind for the agency and hopes to implement in the future. However agencies or officials within an agency exercising delegated authority often do formulate future policy that has an immediate practical impact.[148] The documents containing these policies seemingly should be published in the Federal Register if the policy is of general applicability. Even in this area it is not always clear what should be published and what should not be. Should an agency publish in the Federal Register its presentation to Congress on future plans? Should the Energy Research and Development Administration (ERDA) have published its lengthy National Plan for Energy Research, Development and Demonstration? [149] The energy policy expressed in that report will no doubt affect thousands of decisions by ERDA and other governmental agencies, but it seems futile to seek to publish in the Federal Register all pronouncements by the government on what it intends or hopes to accomplish. The Civil Aeronautics Board did recently publish in the Federal Register a document soliciting comments on proposed actions constituting a series of experiments on various modes of deregulation.[150] This proposed policy, unlike the policies formulated by ERDA, relates directly to governmental regulation of an industry and is thus more closely related to the Federal Register's primary function of publishing each agency's operative law of general applicability and proposed changes therein.

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[143] *CBS v. United States*, 316 U.S. 407 (1942) (policy statement); *Frozen Food Express v. United States*, 351 U.S. 40 (1956) (interpretative rule).

[144] *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 376 (8th Cir. 1974). See also the Supreme Court cases cited in n.47.

[145] *National Forest Preservation Group v. Butz*, 343 F.Supp. 696, 703 (D. Mont. 1972), reversed on other grounds without ruling on the point, 485 F.2d 408 (10th Cir. 1973).

[146] The New York *Times*, July 30, 1975 p. 7 (City Edition). The actual lifting of the moratorium awaits the pending completion of an environmental impact statement. *Id.*

[147] *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 297, 302 (D.C. Cir. 1975).

Critics of hidden law may contend that much of the material in adjudicatory opinions and in staff manuals and other internal directives should really take the form of legislative rules. The public should not only be aware of the policies contained therein but should have an opportunity to participate in their formulation and the resulting rule should bind the agency. This conclusion certainly seems correct for the material on mining claims in the Bureau of Land Management's Manual so intensively surveyed by Professor Strauss in his recent Administrative Conference Study.[151] It also seems true with respect to the "on the reservation" eligibility requirement for welfare benefits in the Bureau of Indian Affairs Manual which the Supreme Court invalidated in *Morton v. Ruiz.*[152] Justice Blackmun's surprising and little noticed opinion in *Ruiz* indicated that eligibility requirements must take the form of legislative rules published in the Federal Register in accordance with section 552(a)(1)(D) even though they are exempt from the informal rule making provisions in sections 553(b)–(d). Encouraging agencies to publish in the Federal Register interpretations of general applicability and general statements of policy nevertheless seems desirable because once the rule surfaces in the Federal Register it will at least focus attention on the distinct issues whether notice and comment procedures are desirable and whether the agency's policy should appear in the form of a legislative rule.

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[148] See *Independent Broker-Dealers Trade Ass'n v. SEC.*, 442 F.2d 132 (D.C. Cir. 1971), where the court treated a letter from the Commission to the New York Stock Exchange as a reviewable statement of policy. The Commission had requested in the letter that the Exchange adopt certain rule changes and stated that the Commission would not institute formal proceedings against the Exchange if it did so.

[149] *New York Times*, July 1, 1975, p. 1, col. 1 (City Edition). The National Plan was not published in the Federal Register.

[150] 40 FR 28722 (July 8, 1975). The document carried the obscure title "A Proposed Means of Evaluating the Consequences of Changed Approaches to Economic Regulation of the Domestic Commercial Air Transportation System."

[151] Strauss, Rules, Adjudications and Other Sources of Law in an Executive Department: the Interior Department's Administration of the Mining Law, 74 *Col. L. Rev.* 1231, 1236–44 (1974).

Section 552(a)(1)(D) only requires that an agency publish in the Federal Register interpretations of *general* applicability and statements of *general* policy. Under section 552(a)(2)(B), an agency must make available and index "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." The legislative history is not enlightening on the distinction between those policy statements and interpretations that must be published and those that must be made available and indexed, but the logical dividing line seems to be between statements and interpretations of general applicability that must be published and those of particular applicability that need only be made available and indexed.[153] Thus, advisory opinions and interpretative rulings directed to named parties need not be published in the Federal Register even if the agency recognizes them as precedents. Professor Davis argues to the contrary and contends that the natural distinction between what must be published and what must be made available is "use or non-use" as precedent.[154] This approach is not compelled by the statute and its implementation would swamp the Federal Register. Professor Davis' approach to the publication of statements of general policy and interpretations of general applicability that appear in adjudicatory opinions is more sensible and should be followed here also. There Professor Davis argues that some policy statements and interpretations should be published and some should not be. Statements or interpretations such as the NLRB's enlargement of the contract bar rule from two or three years are "general" and should be published because of "the legislative quality of such statements and interpretations." [155] A similar test should preclude the publication in the Federal Register of particular interpretative rulings or advisory statements that have precedential significance but lack any general or "legislative" quality.

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[152] 415 U.S. 197 (1974). On *Ruiz*, see Davis, Administrative Law Surprises in the *Ruiz* Case, 75 *Col. L. Rev.* 823 (1975).

[153] *Tax Analysts and Advocates v. IRS*, 362 F.Supp. 1298, 1303–4 (D.C.D.C. 1973), modified in part and remanded, 505 F.2d 350 (D.C. Cir. 1974); *Freuhauf Corp. v. IRS*, 522 F.2d 284 (6th Cir. 1975). See also the text at n.53 and at n.81 on the distinction between "general" and "particular" applicability.

[154] K. Davis, *Administrative Law Treatise* 130 (1970 Supp.).

V. PUBLICATION IN THE FEDERAL REGISTER OF PUBLIC NOTICES ON ADJUDICATORY MATTERS (PARAGRAPHS C AND D OF RECOMMENDATION)

Agencies have increasingly used the Federal Register to give public notice of adjudicatory matters. While a significant number of these documents are required to be published by a specific Act of Congress, the majority of them are not published by statutory command but in accordance with long-standing agency practices sanctioned by the Office of the Federal Register. The Director of the Federal Register has authority under the present regulations to "allow" the publication in the Federal Register of documents not required to be published by law if he "considers" their publication to be in the public interest.[156] Since neither the Federal Register Act nor the Administrative Procedure Act requires the publication of notices of adjudicatory matters, those notices that do appear in the Federal Register are either required to be published by some other specific Act of Congress or allowed to be published on the basis of a public interest determination by the Director of the Federal Register.[157] Acts of Congress expressly requiring the publication of documents in the Federal Register are compiled annually in the Finding Aids volume to the Code of Federal Regulations, but no records are maintained of public interest determinations.

Section 8 of the Federal Register Act [158] provides that a notice of a hearing or of an opportunity to be heard "shall be deemed to have been given" to all persons residing within the States of the Union and the District of Columbia when the notice is published in the Federal Register "except in cases where notice by publication is insufficient in law." The Supreme Court has ruled in the context of a civil suit where the defendant's property is at stake that notice by publication is constitutionally adequate only "where it is not reasonably possible or practicable to give more adequate warning." [159] It is unlikely, however, that constitutional principles of reasonable notice require agencies to do more than publish public notices in the Federal Register to inform interested persons of rule making proceedings and interested non-parties of adjudicatory proceedings. Notice by publication is sufficient in these instances because the persons so notified are not threatened with any direct deprivation of liberty or property.[160] Courts have consistently recognized that the publication of a concise notice in the Federal Register affords interested non-parties constructive or legal notice of a hearing or opportunity to be heard.[161] The Tenth Circuit, for example, recently held that a notice published by the Board of Governors of the Federal Reserve System on an application by a bank holding company to acquire a controlling interest in a proposed new bank gave adequate notice of the proceeding to competing banks.[162] The Eighth Circuit has also held that the publication in the Federal Register by the Food and Drug Administration of a Notice of an Opportunity for a Hearing on the Withdrawal of a New Drug Application afforded adequate notice to a manufacturer of a "me too" drug that had not filed its own application but had piggy-backed on the now withdrawn new drug application.[163] ACUS Recommendation 71–6(E) on Public Participation in Administrative Proceedings nevertheless recognized that it was desirable for agencies by supplemental action to give more adequate public notice than that afforded by the constitutional minimum.[164]

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[155] *Id.* at 126. Professor Davis, in the context of criticizing some extravagant assertions by Justice Blackmun in *Morton v. Ruiz*, 415 U.S. 199 (1974), now argues that interpretative rules in adjudicatory opinions and staff manuals need only be made available for public inspection and apparently never need be published in the Federal Register. Davis, Administrative Law Surprises in the *Ruiz* Case, 75 *Col. L. Rev.* 823, 840 n.63 (1975). While Professor Davis rightly notes the open-ended and uncertain nature of the concept of an interpretative rule, it still appears desirable (as well as statutorily required) for agencies to strive to publish in the Federal Register whatever interpretations of general applicability they have formulated and adopted.

[156] 1 CFR 5.3 (1975). That authority derives from Section 5(b) Federal Register Act, 44 U.S.C. §1505(b).

[157] It might be argued that section 8 of the Federal Register Act, 44 U.S.C. §1508, authorizes an agency to publish in the Federal Register any notice of a hearing or of an opportunity to be heard it wishes to have published. However, that section only provides that notices which are published "shall be deemed" to give legal notice "except in cases where notice by publication is insufficient in law"; the publication itself must still either be required by Act of Congress or allowed in the public interest by the Director of the Federal Register.

[158] 44 U.S.C. §1508.

[159] *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 317–18 (1950).

Statutory Publication Requirements for Notices on Adjudicatory Matters. Congress has not normally acted to require the publication in the Federal Register of notices on adjudicatory matters. In addition, the great majority of the Congressional publication requirements are of narrow applicability and have had little or no impact on the size of the Federal Register. Section 408(b) of the Civil Aeronautics Act,[165] for example, requires that the Civil Aeronautics Board not approve certain applications for consolidation, merger or acquisition without a hearing unless notice of its intention to dispense with the hearing is first published in the Federal Register. Very few if any notices in this category have appeared in the Federal Register in recent years. Pub. L. 93–251 [166] likewise requires the Secretary of the Interior to publish a notice in the

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[160] *Bank of Commerce v. Board of Gov. of Fed. Res. Sys.*, 513 F.2d 164, 167 (10th Cir. 1975) (Doyle, J.).

[161] See, e.g., *Buckner Trucking, Inc. v. United States*, 354 F.Supp. 1210, 1218–19 (S.D. Tex. 1973) (three judge court) (notice to competitors of motor carrier applicant).

[162] *Bank of Commerce v. Board of Gov. of Fed. Res. Sys.*, 513 F.2d 164 (10th Cir. 1975).

[163] *North American Pharmacal, Inc. v. DHEW*, 491 F.2d 546 (8th Cir. 1973). The court in *North American Pharmacal* did comment that "Notice in the Federal Register is calculated to reach all such 'me too' manufacturers who, because of their dependence for validity upon the NDA's should be required, both as a matter of self-interest and of law, to keep abreast of the FDA regulations affecting their products. Under these circumstances it should not be incumbent on the FDA to ferret out the 'me too' manufacturers." *Id.* at 552. Thus the decision, while upholding the legal sufficiency of Federal Register notices, is also consistent with the constitutional principle that notice must be "reasonably calculated, under all the circumstances," to inform interested persons. *Mullane v. Central Hanover Bank Co.*, 339 U.S. 306 (1950).

[164] Gellhorn, Public Participation in Administrative Proceedings, 2 ACUS *Recommendations and Reports* 376, 416 (1972).

[165] 49 U.S.C. §1378(b).

[166] 88 Stat. 43.

Federal Register of the establishment of the Big South Fork National River and Recreation Area whenever he determines that the United States has acquired sufficient acreage within the boundaries of the area to administer it efficiently. Almost one half of the statutory publication requirements are similar to Pub. L. 93–251 in that they require the publication of only one document in the Federal Register to announce a particular executive action. The following list of statutes requiring the publication of notices in the Federal Register is therefore quite incomplete but it includes the majority of the statutes that generate annually the publication of a substantial number of documents in the Federal Register.

1. *The Atomic Energy Act of 1954.* Section 182(b) of the Atomic Energy Act of 1954 [167] required the Atomic Energy Commission (now the Nuclear Regulatory Commission) to give notice in writing of an application for a license for a nuclear facility for the generation of commercial power to "such regulatory agency as may have jurisdiction over the rates and services of the proposed activity, to municipalities, private utilities, public bodies, and cooperatives within transmission distance authorized to engage in the distribution of electrical energy." In addition, the statute required the Commission to publish notice of each application "once each week for four consecutive weeks in the Federal Register." Under section 105(c) of the same Act,[168] the Commission was also required to publish in the Federal Register the Attorney General's advice whether or not the proposed license "would tend to create or maintain a situation inconsistent with the antitrust laws." The 1970 amendment to section 182(b) [169] permitted the Commission to give notice of applications to municipalities, private utilities, public bodies, and cooperatives by published notice "in such trade or news publications as the Commission deems appropriate to give reasonable notice." Only the appropriate regulatory agency with jurisdiction over the rates and service of the proposed facility was to be notified personally in writing. Finally, the 1962 amendments to section 189(a) of the Act [170] required the Commission to hold a hearing on an application for a construction permit "after thirty days notice and publication once in the Federal Register."

The legislative history of these various provisions [171] does not indicate the basis for requiring the Commission to use the Federal Register to give public notice of particular applications, but the statutes and their history do reflect an unusually high level of Congressional concern to afford interested persons adequate notice of proposed nuclear power facilities. The Commission publishes annually in the Federal Register hundreds of notices of applications and of hearings in accordance with the publication requirements in these statutory provisions. Notices of applications appearing in the Federal Register briefly identify the applicant and the authorization sought and instruct the reader where he may obtain further information (e.g., copies of the application and other relevant documents) and how he may submit comments on the application. The Commission also publishes in the Federal Register notices on the issuance of licenses and of amendments thereto, although the publication of these notices is not strictly required by statute. The Commission does not otherwise publish agency opinions in the Federal Register, and the notices of the agency orders issuing or amending licenses that are published simply announce the licensing decision and indicate where the texts of any relevant documents may be located.

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[167] 68 Stat. 954.

[168] 68 Stat. 938.

[169] 84 Stat. 1473.

[170] 76 Stat. 409.

[171] These provisions are now codified respectively in 42 U.S.C. §§2232(c), 2135(c)(3) and 2239(a).

2. *Educational Scientific and Cultural Materials Act of 1966.*[172] This statute requires the Department of Commerce to publish in the Federal Register notices of applications referred to it by the Secretary of the Treasury for the duty-free importation of articles of scientific value not available on the domestic market. Upon receipt of the application the Secretary of Commerce shall "by publication in the Federal Register, afford interested persons and other government agencies reasonable opportunity to present their views with respect to the question whether an instrument or apparatus of equivalent scientific value for the purposes for which the article is intended to be used is being manufactured in the United States." After considering any views presented (including any written advice from the Secretary of Health, Education and Welfare), the Secretary of Commerce must determine whether an instrument or apparatus of equivalent scientific value is being manufactured in the country. The Secretary's finding, with a statement of the reasons therefore, is also specifically required to be published in the Federal Register. The texts of the Secretary's orders published in the Federal Register do not contain interpretations or policy statements of general applicability, and have little precedential significance because the statutory standards are comparatively clear and each case is decided on its own facts.

The Domestic International Business Administration (DIBA), which administers the program within the Department of Commerce, receives annually 700 or 800 applications that are duly noted in the Federal Register. The applicants are invariably hospitals, educational institutions, research institutes, or state agencies. The Federal Register notices, which are in actuality summaries prepared by DIBA of the often bulky applications, cite the agency's statutory authority, identify the applicant and then briefly describe the article to be imported and its intended use. Interested persons are also informed of the opportunity to present their views and given directions on how to do so. Sometimes a dozen or more notices are grouped together so that this information does not have to be repeated for each application. Additional information required by the statute to be included in the application (e.g., the basis for the applicant's belief that the article is not available domestically and the identity of the applicant's foreign source of supply) are not included in the Federal Register notices, but the notices indicate where the complete applications may be inspected and copies of applications are normally supplied upon request.

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[172] 80 Stat. 900, 19 U.S.C. §1202 Schedule 8, Part 4.

Only a small percentage of applications (less than 5%) are denied on the merits because of the availability on the domestic market of an equivalent piece of equipment, although almost a quarter of the total number of applications are denied for informational deficiencies or failure to prosecute. Comments are received from interested persons (other than governmental agencies) on roughly 10% of the applications. The commentators are invariably domestic manufacturers of scientific equipment. Since the range of scientific articles subject to duty-free entry is substantial, the number of potentially affected domestic manufacturers is considerable. DIBA encourages domestic manufacturers to subscribe to the Federal Register and in addition provides a special informational service for domestic manufacturers who request it. Subscribers to this service automatically receive from DIBA copies of complete applications in their areas of interest. A domestic manufacturer often needs to review the complete application in order to discover the exact specifications of the imported article to determine whether he or any other domestic concern manufactures an equivalent article. Only forty or so domestic manufacturers have taken advantage of this special service. While the comments received by DIBA from interested manufacturers are often helpful, they are rarely dispositive. DIBA's own staff and its scientific consultants at the Department of Health, Education and Welfare are generally cognizant of what equipment is available on the domestic market and will deny, or return to the applicant for additional information, applications that are deficient or questionable on their face. Comments are perhaps most useful when the applicant alleges that he could not obtain a bid from any domestic manufacturer on a particular piece of equipment that was at one time manufactured domestically. Once the application is noted in the Federal Register, domestic manufacturer A may comment "that you never asked me and I can supply your need." Such cases occasionally arise and usually result in the withdrawal or denial of the application.

3. *Endangered Species Act of 1973.*[173] Section 10(c) of the Endangered Species Act [174] requires the Secretary of the Interior to publish in the Federal Register a notice of each application for an exemption or

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[173] 87 Stat. 884, codified in 16 U.S.C. §§1531 et seq.

[174] 16 U.S.C. §1539(c).

permit under the Act. The notice shall invite the submission from interested persons of "written data, views or arguments with respect to the application." Orders granting permits or exemptions must also be published, along with the Secretary's findings that the exemption or permit was applied for in good faith, will not operate to the disadvantage of the endangered species if granted, and will be consistent with the purposes and policies of the Act.[175] Permits authorize the holder to engage in otherwise prohibited acts "for scientific purposes or to enhance the propagation or survival of the affected species," while exemptions are granted on the basis of undue economic hardship.[176] The number of permit applications is on the increase (few, if any hardship exemptions are granted) and the number of published notices in the Federal Register now exceeds 100 per year. Each notice normally reproduces in its entirety the completed application form and any covering or supporting letters supplied by the applicant and thus contains detailed information about the applicant (normally a zoo, scientist or conservation group) and his proposed project or economic hardship. The data published may even include the height, weight, eye-color and other personal characteristics of the individual applicant.[177] Notices of individual applications fill several hundred pages of the Federal Register annually. The United States Fish and Wildlife Service that administers the Act for the Department of the Interior did attempt several years ago to summarize the data on the application forms, but encountered opposition from conservation groups that wished to obtain complete information through the Federal Register. At present, a number of conservation organizations have formed a group known as Monitor that watches for notices of applications in the Federal Register and comments on roughly 15% of the applications. The Fish and Wildlife Service also receives a significant number of comments from individuals scattered throughout the country who somehow learn of the applications. The majority of the applications, however, are noncontroversial. Only 25% attract any comments at all and almost 95% of the applications accepted by the agency for filing and noted in the Federal Register are granted.

4. *Marine Mammal Protection Act of 1972.*[178] This Act contains permit procedures and publication requirements very similar to those in the Endangered Species Act. It is primarily administered by the National Oceanic and Atmospheric Administration in the Department of Commerce. The number of published notices is growing and now exceeds fifteen per month.

5. *Occupational Safety and Health Act of 1970.*[179] Section 6(c) of

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[175] 16 U.S.C. §1539(d).

[176] 16 U.S.C. §1539(a) and (b).

[177] See 40 FR 3232 (January 20, 1975) (application for permit to hold peregrine falcons in captivity).

[178] 86 Stat. 1027, codified in 16 U.S.C. §1361 et seq.

[179] 84 Stat. 1594.

this Act [180] requires the Occupational Safety and Health Administration in the Department of Labor to publish in the Federal Register a statement of reasons whenever it grants an exemption or variance from an occupational safety or health standard. The Occupational Safety and Health Administration also publishes notices of applications for variances,[181] although the statute requires only that an employer seeking a variance notify his employees of the application by posting a summary at the place of employment and by giving a copy of the application to the employees' authorized representative.[182] A half dozen or so such notices appear monthly.

6. *1972 Amendments to the Motor Vehicle Safety Act.*[183] These amendments likewise require the National Highway Traffic Safety Administration in the Department of Transportation to publish in the Federal Register notices of exemptions granted to manufacturers from motor vehicle safety standards. That agency, in addition to publishing the required notices of decisions, also publishes brief notices of petitions as a means of fulfilling its statutory obligation to give "notice and opportunity to comment" on petitions for exemptions.[184] Once again a half dozen or so notices appear monthly. The agency receives one or more comments on most petitions, almost exclusively from manufacturers motivated by business interests to support or oppose particular petitions.

7. *Antitrust Procedures and Penalties Act of 1974.*[185] Section 2(b) of this Act provides that the United States shall publish in the Federal Register proposed consent judgments in civil anti-trust cases brought by the Department of Justice. In addition, the government is required to publish in the Federal Register the competitive impact statement prepared by the Department of Justice on the proposed decree and any written comments relating to the proposal received by the Department and the response of the United States thereto. Section 2(c) also requires the United States to publish in newspapers of general circulation in the district in which the case is filed, in the District of Columbia, and in such other districts as the court may direct, a summary of the proposed decree, a summary of the competitive impact statement, and a list of the materials and documents which the United States has made available for public inspection. These notices are to be published in the newspapers involved for seven days over a period of two weeks. While one may applaud the Congressional intent to substitute "sunlight for twilight" in

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[180] 29 U.S.C. §655(e).

[181] See the notice of application by Caterpillar Tractor Co., 39 FR 2049 (January 16, 1974), and notice of grant of variance to Caterpillar Tractor, 40 FR 2629 (January 14, 1975). The OSHA notices are brief and informative, but the time lag between the application and the decision reveals the slowness of the variance process. Morley, Mandatory Occupational Safety and Health Standards — Some Legal Problems, 38 *Law and Contemporary Problems* 584, 595 (1974).

[182] 29 U.S.C. §655(b)(6)(B)(v).

[183] 86 Stat. 1159, codified in 15 U.S.C. §1410.

[184] 15 U.S.C. §1410(a).

[185] 88 Stat. 1700, codified in 15 U.S.C. §16 note.

consent decree practices,[186] one may still wonder whether or not this effort involves a misuse of the Federal Register. Certainly it seems unnecessary to publish anything more in the Federal Register than must be published in newspapers of general circulation. Notices in the Federal Register that summarize the proposed consent decree and competitive impact statement should adequately alert the interested reader who could be told where to go for additional information. Since the Antitrust Procedure and Penalties Act only became law on December 21, 1974, it has not yet had much impact on the Federal Register. The first proposed consent judgment was published on February 21, 1975.[187]

8. *1964 Amendments to the Federal Communication Act of 1934.*[188] Prior to 1964, section 309(e) of the Communications Act of 1934 [189] required the Federal Communications Commission, when it formally designated a broadcast application for a hearing, "to notify the applicant and all other known parties in interest of such action and the grounds and reasons therefore, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally." Under the section as it then stood, a party in interest who had not been notified of the designation for hearing could acquire the status of a party to the proceeding by filing a petition for intervention "at any time not less than ten days prior to the date of hearing." The Commission complained to Congress that dilatory tactics by late-filing interveners disrupted its prehearing procedures. Congress responded by amending section 309(e) to require parties in interest to petition for intervention "not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register." [190]

Strictly speaking, the 1964 amendment to section 309(e) did not require publication in the Federal Register of Commission orders designating broadcast applications for a hearing but recognized that the Commission was already publishing them and took advantage of the legal notice provided by Federal Register publication to cut off at any earlier stage than previously allowed the right of interested persons to petition to intervene in the proceeding. The Commission accordingly continues to publish in the Federal Register notices of Commission orders designating applications for a hearing and specifying hearing issues. Several hundred such notices are published annually. They often are several pages long and summarize the facts and issues in the case and the Commission's reasoning as to why a hearing is necessary and contain the text of the order designating the hearing issues. In most if not all cases the notices published in the Federal Register also contain the complete text of the Commission's decision. The Commission publishes all hearing orders on applications for standard (AM) radio, FM radio, and television broadcast licenses; and the great majority of orders published fall into these categories. Hearing orders on applications for safety and special radio services (e.g. aviation and maritime radio services, citizens and amateur radio services, etc.) are also published as they occur,[191] but the hundreds of revocation proceedings commenced annually with respect to these licensees are not noted in the Federal Register. The opportunity to be heard in these disciplinary proceedings is unlikely to interest persons other than the immediate parties thereto.

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[186] See House Report. 93–1463 in 1974 *Congressional and Administrative News* 7657, 7659 for a discussion of the Act's purpose. For sharp criticism of these provisions, see Handler, Antitrust-Myth and Reality in an Inflationary Era 50 *N.Y.U.L. Rev.* 211, 239–244 (1975).

[187] 40 FR 7688.

[188] 78 Stat. 193. See 1964 *Congressional and Administrative News* 2175 for committee reports and other legislative history.

[189] 47 U.S.C. §309(e) (1958).

[190] 47 U.S.C. §309(e).

Some of the hearing notices that are published involve adjudications of limited or localized public interest where the agency is applying settled principles to particular, often uncontested facts. For example, the Federal Register for January 3, 1975,[192] contains a full page Commission order designating for a hearing the renewal application of a standard radio station (KIKX in Tucson, Arizona) because the station allegedly faked the kidnapping of one of its disc jockeys, made false entries or omitted to make required entries in its program logs, and engaged in other forms of wrong-doing in violation of the Commission's regulations. The order recites the Commission's legal authority for holding the hearing, specifies eleven hearing issues, and contains a notice of apparent liability for violations of the Commission's rules. The order does not specify the time and place of the hearing but requires the licensee to file a written appearance stating its intention to appear at a subsequently fixed hearing date. The order otherwise complies with the provisions in section 554(b) of the Administrative Procedure Act on the information that must be afforded to persons entitled to notice of a formal, on the record adjudicatory hearing.[193] The concluding paragraph of the order instructs the Secretary of the Commission to send a copy of the order by certified mail to the licensee. Surprisingly, the Federal Register notice containing the text of the hearing order does not solicit comments from interested persons or indicate how interested persons may petition to intervene as a party to the proceeding in accordance with section 1.223 of the Commission's rules [194] or appear and give evidence at the hearing in accordance with section 1.225.[195] While the KIKX hearing order is relatively brief (one full page in the Federal Register) and does little more than state the hearing issues, other Commission memoranda opinions and orders on motions to enlarge or delete hearing issues that are published in the Federal Register contain detailed discussions of the facts and the law along with a specification of any new or deleted hearing issues.[196] These documents are in actuality interlocutory Commission opinions and not public notices. The degree of public interest in many of these adjudicatory proceedings is potentially quite high, and it is ironic that hearing notices published in the Federal Register that are intended to cut off the rights of interested persons to petition to intervene thirty days after the date of publication do not even mention that interested persons may petition to intervene as parties to the proceeding.

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[191] See, e.g., FCC Order designating applications for aeronautical advisory station for consolidated hearing on stated issues, 40 FR 5397 (February 5, 1975); FCC Order designating application for amateur radio station and operator's license for a hearing on stated issues, 40 FR 2750 (January 15, 1975).

[192] 40 FR 833.

[193] That section provides:

"Persons entitled to notice of an agency hearing shall be timely informed of

1) the time, place and nature of the hearing;

2) the legal authority and jurisdiction under which the hearing will be held; and

3) the matters of fact and law asserted . . . ." 5 U.S.C. §554(b).

[194] 47 CFR 1.225 (1974).

Agency Practices on the Publication of Notices on Adjudicatory Matters Where Publication in the Federal Register is Not Expressly Required by Statute. Agency practices on the publication in the Federal Register of notices on adjudicatory matters vary greatly. Where publication of a particular category of notices is not required by statute, it is most likely based on a public interest determination by the Director of the Federal Register.[197] Fred Emery, the present Director of the Federal Register, has on occasion allowed publication of documents in the public interest. Perhaps the most significant exercise of discretion reported by Mr. Emery involves the publication of notices on the availability of draft and final environmental impact statements. The Council on Environmental Quality (CEQ) publishes a weekly list of environmental impact statements received by it and available for comment. The publication of this notice triggers the running of the applicable minimum period for review and comment.[198] In addition, the CEQ publishes periodically in the Federal Register lists of draft statements in preparation.[199] Many individual agencies also publish separate notices on the availability of draft and final environmental impact statements and of negative declarations. Most if not all agencies within the Department of Agriculture and the Department of the Interior do so, while agencies within the Department of Transportation, the Department of Housing and Urban Development, and the Defense Department generally do not. The CEQ does not expressly require publication of these notices in the Federal Register but does require all agencies "to insure the fullest practicable provision of timely public information concerning the existence and availability of environmental statements." [200] Individual mailings, newspaper publication, and equivalent notice giving devices are required for draft statements.[201]

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[195] 47 CFR 1.223 (1974).

[196] See, e.g., *Western Television Co., et al.*, 40 FR 1740 (January 9, 1975) (four pages).

[197] See text at n.156 for a discussion of the Director's authority.

[198] 40 CFR 1500.11(c) (1975).

[199] 40 CFR 1500.6(e) (1975).

[200] 40 CFR 1500.11(d) (1975).

The importance of public participation in the preparation of environmental impact statements and the large number of persons interested in environmental impact statements support the Director's public interest determination on the publication of these notices. They are brief and merely describe the governmental action covered by the environmental impact statement and notify the interested reader how he may obtain a copy of the full statement and submit comments thereon. The situation is more complex in other areas. Each agency has developed its own practice with respect to the use or non-use of the Federal Register to publish notices on adjudicatory matters. Agency publication practices that have developed in the distant past have been sanctioned by the Office of the Federal Register, even though there is no recorded (or at least discoverable) public interest determination. If one asks agency personnel about the use of the Federal Register, the most likely response is that the agency has for years published certain documents in the Federal Register and while "we don't know why the agency instituted the practice we can see advantages in continuing it and dangers in discontinuing it." Section 8 of the Federal Register Act is also cited as statutory authority for publishing notices of particular applicability.[202] In the 1940's and 1950's the daily edition of the Federal Register averaged between 20 and 100 pages and there seemed to be no harm in adding some hearing notices. By the early 1960's the Civil Aeronautics Board, Federal Power Commission, Federal Maritime Commission, Interstate Commerce Commission, and Federal Communications Commission were publishing in the Federal Register basically the same material that they presently publish. The volume of that material has greatly increased in the intervening years, and the size of the Federal Register has been further swollen by the expanded use of rule making and by new statutory publication requirements (e.g., The Federal Advisory Committees Act of 1972).

The following list of agencies is not intended to be inclusive but contains most of the larger and more visible agencies that extensively use the Federal Register to publish notices on adjudicatory matters.

1. *Federal Power Commission.* Since the 1930's the Commission has used the Notices section of the Federal Register to publish notices of particular applications and of Commission orders initiating adjudicatory proceedings even though no statute has expressly required it to do so. The Commission's present rules plainly favor the use of the Federal Register to give notice by providing: "Whenever appropriate, publication of an initial notice or order in the Federal Register shall be the primary means of informing interested persons and the general public that the proceeding to which the notice or order relates has been instituted before

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[201] 40 CFR 1500.9(d) (1975).

[202] 44 U.S.C. §1508. See n.157 *supra*.

the Commission. The mailing of individual copies shall be confined to that which is required by law, by the Commission's rules and regulations, or by other considerations deemed valid by the Secretary in specific instances." [203] Accordingly, the Commission publishes in the Federal Register notices of 1) Commission orders initiating proceedings to determine jurisdictional status of persons engaged in the transportation or sale of natural gas (18 CFR 3.161); 2) applications to export or import natural gas (18 CFR 3.162); 3) Commission orders initiating rate proceedings under section 5(e) of the Natural Gas Act; 4) applications for certificates of convenience and necessity under section 7 of the Natural Gas Act (18 CFR 3.168) and for the extension (18 CFR 3.166) or abandonment (19 CFR 3.167) of facilities or service thereunder; 5) initial tariff filings by natural gas pipeline companies and proposed changes therein;[204] and 6) Commission orders suspending new tariff filings of natural gas companies and ordering a hearing on the lawfulness thereof. The regulations contain similar publication requirements for applications and for orders initiating adjudicatory proceedings under the Federal Power Act. Initial rate schedules filed by electrical utilities and proposed changes therein are also noted in the Federal Register;[205] the utility must in addition mail copies to the appropriate State Commission and to each customer affected by the filing.[206]

Together the Commission's publication practices under the Natural Gas Act and the Federal Power Act generate well over a thousand documents annually in the Notices section of the Federal Register. Many of these notices are complex and fill several pages. They are published in no intelligible order other than the date of filing with the Office of the Federal Register. In addition to publishing these notices in the Federal Register, the Commission gives individual notice in writing to the appropriate State Commission and to natural gas companies or electrical utilities directly affected by a pipeline abandonment, electrical interconnection or similar application or Commission proceeding. This form of notice-giving is required by numerous sections of the Natural Gas Act and the Federal Power Act and by the Commission's implementing regulations. Newspaper publication is also required in one instance. Under Part I of the Federal Power Act, the Commission must publish notice of an application for a preliminary permit for a hydroelectric project "once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the land affected thereby are situated." [207] In addition to the above notice-giving devices, the Commission's Office of Public Information issues press releases on "major applications, decisions, opinions, major orders, rule making actions, new publications, major personnel changes and other matters of general public interest." [208]

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[203] 18 CFR 2.1(a) (1975).

[204] The Commission's regulations only require notices in the Federal Register of tariff filings by natural gas pipeline companies. 18 CFR 2.1(a)(1)(i)(A) (1975). Filings by independent natural gas producers are apparently not noted. The Commission's regulations also require all natural gas companies (both producers and pipelines) to "post" new tariffs by mailing them to the appropriate State Commission and to each customer affected at the same time they are sent to the Commission for filing. 18 CFR 154.22 (1975).

[205] 18 CFR 2.1(a)(1)(i)(A) (1975).

[206] 18 CFR 35.3 (1975).

The Federal Register notices of Commission orders initiating hearing proceedings summarize the relevant facts and the Commission's reasoning and contain the text of the order. The full text of the Commission's opinion is also printed, although the existence of concurring or dissenting opinions and of accompanying appendices may only be noted. The notices do not indicate how interested persons may present their views on the specified hearing issues or otherwise seek to participate in the proceeding. Notices of applications, on the other hand, briefly summarize the facts and the authority sought. They are indexed by company, and the reader of the Federal Register interested in a particular electrical utility or natural gas company can quickly learn the nature of any pending applications. The notices inform interested persons who desire to be heard or to make any protest with respect to the application that they may file a petition to intervene or protest in accordance with the cited provisions of the Commission's rules. Perhaps the least informative notices published by the Commission are the notices of new tariff filings which often contain nothing more than the company's name and the new rates. Tariff filings are rarely noted in the Federal Register, and the experience of the Federal Power Commission indicates that legal notices in the Federal Register may not be the best vehicle for giving public notice of tariff filings. The Interstate Commerce Commission recently adopted new rules that require rail, motor and water carriers to afford greater public notice of proposed general rate increases. The new requirements include the preparation by the carriers of press releases for newspapers in the affected areas that describe the proposal in language sufficient to appraise a reader who is not an expert in transportation matters of the nature of the proposal.[209]

2. *The Interstate Commerce Commission.* The Commission publishes notices of a wide variety of applications for operating authority by motor carriers, water carriers and freight forwarders processed under its special rules of practice for expediting the disposition of these applications.[210] Thousands of individual applications are noted annually, mostly involving motor carriers. The applications are indexed only by type of carrier (i.e., person or property) and authority sought (i.e., elimination of a gateway, transfer, temporary operating authority, etc.). The Federal Register indexes are thus of no assistance to the reader interested in

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[207] 16 U.S.C. §797f.

[208] 18 CFR 3.182(c) (1975).

[209] The new rules in Parts 1102, 1104, 1105, 1303, and 1305 of 49 CFR may be found at 40 FR 26032 (June 20, 1975).

[210] The special rules of practice are found in 49 CFR 1100.200 (1974).

applications by particular carriers, in particular geographic areas, or for particular commodities. Although the notices prepared and published by the Commission tersely summarize the applications themselves, the volume of notices is so great that they have occupied nearly 5% of the total pages in some months of the Federal Register. Also, some initial applications for operating authority consume five or more pages and specify in minute detail the commodities and routes covered by the application.

The Motor Carrier Act does not expressly require the publication in the Federal Register of these notices except in one narrow category of cases. Section 205(e) of the Act [211] requires the Commission to afford interested persons reasonable notice of all proceedings under the Act and an opportunity to intervene in these proceedings. That section does not specify any particular form of notice. Section 206(a)(6) of the Act (as amended in 1962 by Pub. L. 87–805),[212] on the other hand, expressly requires the publication in the Federal Register of notices of applications in order to give notice to interested persons. That section, however, only applies to certain *intrastate* applications filed with state regulatory commissions. If the state commission follows certain required procedures, the intrastate applicant can also engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted. Notice must be published in the Federal Register of the intrastate application and of the applicant's desire to engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted; and the state commission must afford interested persons a reasonable opportunity to be heard on the matter and must find that the public convenience and necessity requires that the carrier authorized to engage in intrastate operations also be authorized to engage in interstate operations within the limits of the intrastate authority. The Interstate Commerce Commission has assumed responsibility for publishing these notices in the Federal Register,[213] but the notices instruct interested persons to direct their protests and comments to the appropriate state agency rather than to the Commission. Roughly a dozen or so such notices appear monthly. The purpose of the 1962 amendment to section 206(a)(6) was to restrict the power of state commissions to confer interstate operating authority on intrastate motor carriers. Previously state certificates to intrastate carriers had automatically conferred authority to engage in interstate transportation within the limits of the intrastate authority conferred.[214] It is thus consistent with the purpose of the 1962 amendments for Congress to require notice in the Federal Register to alert competing carriers and other interested persons of pending state proceedings that might result in the conferral of Federal rights.

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[211] 49 U.S.C. §305(e).

[212] 49 U.S.C. §306(a)(6).

[213] See 49 CFR 1100.245 (1974).

[214] House Report 1090, 88th Cong. 1st Sess., 1962 *Congressional and Administrative News* 3165, 3166.

The considerations that motivated Congress to require Federal Register publication of notices of intrastate applications are not necessarily present in the case of interstate applications filed with the Commission. As late as the mid-1950's, the Commission's rules required applicants for motor carrier operating authority to notify in person or by registered or receipted mail each motor, water or rail carrier known to the applicant to be in competition with the proposed service. Applicants were required to make diligent inquiry to discover the identity of affected competitors. Publication of notices in the Federal Register was not used as a means of affording competitors constructive or legal notice of new applications. In *Murphy Motor Freight Lines v. United States*,[215] the court held that competing carriers were interested persons that had a statutory right under section 205(e) of the Motor Carrier Act to reasonable notice of new applications. A competitor who was not notified due to the applicant's failure to exercise due diligence could, therefore, petition to reopen the proceeding that had resulted in the grant of the application. Shortly thereafter the Commission switched from requiring applicants to give their competitors actual notice of new applications to providing competitors with constructive notice through the publication of summaries of applications in the Federal Register. Accordingly, the Commission's rules presently provide that "Notice of the filing of applications to competitors and other interested persons will be given by the publication of a summary of authority sought in the Federal Register. . . . No other notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State Boards, and Regional Directors of the Commission's Bureau of Operations as may be required by the prescribed form of application." [216] Motor carriers and affected shippers promptly subscribed to the Federal Register in large numbers and are among its most diligent and careful readers. Mistakes in other documents published in the Federal Register sometimes go undetected, indicating that no one reads some of the documents published in the Federal Register; but notices of motor carrier applications are read and are so closely scrutinized that the most minor mistakes are detected. Despite this heavy use of the Federal Register, motor carrier applications are of interest only to a narrow segment of the Federal Register readership. Even if there were a sufficient public interest in motor carrier applications, the presentation and indexing of the Federal Register notices are such that they are usable only by the specialist. Dozens of notices are run together one after another for twenty to thirty pages at a time. A one line heading identifies each carrier applicant, but there is no way the lay reader can quickly determine the commodities or route covered by the application noted or discern the significance of the application.

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[215] 148 F.Supp. 471 (D. Minn.) (three judge court), aff'd per curiam sub nom. *Manson Dray Line, Inc. v. Murphy Motor Freight Lines, Inc.* 355 U.S. 11 (1957).

[216] 49 CFR 1100.247(c)(1) (1974).

3. *Civil Aeronautics Board.* The Board publishes in the Federal Register notices of all Board orders in certificate, enforcement and rate making proceedings (both suspension cases and on-going investigations) that designate a matter for a hearing or establish or modify hearing issues or procedures. These notices contain the full text of the Board's opinion, including a statement of the facts, discussion of the law, and the text of the Board's order. While final decisions dismissing a complaint without a hearing or entering an order after hearing are not normally published in the Federal Register, they are occasionally published there by special order of the Board at the request of the Board's staff. Applications and tariffs filed with the Board are not normally noted in the Federal Register but are included in a weekly "Notice of Applications or Amendments Thereto" prepared by the Publication Services Section of the Board and mailed to subscribers on written request for a prescribed fee.[217] The Board's regulations do require, however, the publication in the Federal Register of notices of applications for tariff authority for pick-up and delivery zones for aircargo.[218] One or two such notices appear monthly in the Federal Register. The Board, through its Passenger and Cargo Rates Division in the Bureau of Economics, also publishes notices of International Air Transport Association (IATA) rate conference agreements or amendments thereto filed for approval under section 412(a) of the Civil Aeronautics Act.[219] That section does not contain any express notice requirement.

4. *Federal Trade Commission.* The Commission does not use the Federal Register to give public notice of complaints or hearings in its adjudicatory proceedings. The Commission does, however, publish the texts of its final orders in adjudicatory proceedings in the Rules and Regulations section of the Federal Register. These orders are indexed as rules according to their subject matter under Part 13 of Title 16 on Prohibited Trade Practices. The Federal Register document announces each decision under the respondents' names and prints the full text of the order (designating it a consent order or an adjudicated order). The original complaint and the Commission's opinion (if any) are only filed with the Office of the Federal Register and not published in the Federal Register. Several hundred such orders are published annually. Part 13 of Title 16 as it appears in the bound volume of the Code of Federal Regulations does not reprint or even cite these orders but simply contains the index for prohibited trade practices. There is presently a gap of approximately three months between the effective date of a Commission order

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[217] 14 CFR 384.8(d) (1975).

[218] 14 CFR 222.3 (1975).

[219] 49 U.S.C. §1382(a).

and its appearance as a Prohibited Trade Practice in the daily Federal Register. The Commission's practice of publishing as regulations its orders in adjudicatory proceedings is unique among federal agencies. The closest analogy is the Interstate Commerce Commission's practice of publishing Car Service Orders and amendments thereto as regulations under Part 1033 of Title 49 of the Code of Federal Regulations. Car Service Orders allow named railroads to operate over the trackage of the railroad subject to the order. Once again the orders are published only in the Federal Register and are not preserved in the bound volume of the Code of Federal Regulations.

5. *Federal Maritime Commission.* The Commission primarily uses the Notices section of the Federal Register to give public notice of agreements between carriers filed with the Board for approval pursuant to section 15 of the Shipping Act.[220] The notices tersely identify each agreement filed (including amendments or extensions to existing agreements) and inform the reader how he may locate a copy of the complete agreement and comment or seek a hearing on the agreement. Two or three hundred such notices appear annually. Any hearings ordered on agreements filed by carriers are also noted in the Notices section of the Federal Register, but Commission orders to approve or disapprove an agreement are not otherwise noted.

6. *Board of Governors of Federal Reserve System.* The Board publishes in the Federal Register notices of all section 3 applications and of most section 4 applications under the Bank Holding Company Act of 1956 [221] and of all bank merger applications for which the Board is the responsible agency under section 2(18) of the Federal Deposit Insurance Corporation Act.[222] Publication of these notices is not required by statute but is required by regulation.[223] The notices prepared by the Board clearly summarize the often complex applications and inform the reader how he may submit his views or request a hearing on an application. The texts of Board orders approving or disapproving particular applications are also published in their entirety in the Federal Register and sometimes fill two or three pages. These notices apparently cover the entire adjudicatory docket of the Board. Other federal banking agencies do not use the Federal Register to give public notice of their adjudicatory proceedings. Neither the Comptroller of the Currency nor the Federal Deposit Insurance Corporation publish notices in the Federal Register on bank merger applications for which they are the responsible agencies under section 2(18) of the Federal Deposit Insurance Corporation Act. Banking statutes and regulations have traditionally required published

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[220] 46 U.S.C. §814.

[221] 12 U.S.C. §§1842 and 1843.

[222] 12 U.S.C. §1828.

[223] 12 CFR 262.3(g) (1975).

notices of applications and of other proceedings in newspapers of general circulation in the communities where the affected banks are located.[224]

7. *Drug Enforcement Administration.* Section 304 of the Controlled Substances Act of 1970 [225] authorizes the Drug Enforcement Administration in the Department of Justice to deny, revoke or suspend a registration to manufacture, distribute or dispense a controlled substance. The statute subjects these hearings to the requirements of the Administrative Procedure Act but does not expressly require the Administration to publish notices of hearings or orders in the Federal Register. The Administration nevertheless routinely publishes notices of hearings on show cause orders and of orders denying, revoking or suspending registrations of named physicians, manufacturers, or other persons. Thirty or forty such hearings take place annually, generating at least one hundred brief notices in the Federal Register. The Drug Enforcement Administration also processes annually thousands of applications for registration to manufacture, distribute or dispense controlled substances, but applications are not noted in the Federal Register except for applications to be registered as a bulk manufacturer of controlled substances in Schedules I and II.[226] In other cases a notice is only published in the Federal Register when an applicant requests a hearing on a show cause order. Section 1008 of the same Act [227] requires in addition that persons be registered in order to import or export controlled substances. Each month the Administration publishes in the Federal Register a half dozen or so notices of applications by individual drug or chemical companies. There is no statutory requirement for publishing these notices, although their publication is required by regulation.[228] The statute, however, does grant registered bulk manufacturers an opportunity for a hearing to challenge an application for registration to import a controlled substance in Schedule I or II.[229] The regulations specifically provided that all registered bulk manufacturers will receive individual notice by mail of new applications to import.[230]

Discussion of Paragraph C of Recommendation on Standards for Publication in the Federal Register of Notices on Adjudicatory Matters. Paragraph C of the Recommendation attempts to delineate the appropriate role of the Federal Register in giving public notice of adjudicatory matters. Subparagraph C(1) recognizes that the Federal Register's role does not include the publication of final orders and opinions in adjudicatory proceedings. Public notice of final agency decisions is unnecessary since there is no further opportunity available for interested persons to comment or otherwise participate in the proceeding. Subparagraph C(1) accordingly provides that an agency's decisional law should be reported in separate agency publications and not in the Notices section of the Federal Register.

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[224] See 12 U.S.C. §215(a) (applications to Comptroller of Currency for consolidation of national banks or of State banks with national banks); 12 CFR 303.14 (1975) (applications to FDIC).

[225] 21 U.S.C. §824.

[226] See 21 CFR 1301.43(a) (1975).

[227] 21 U.S.C. §958.

[228] 21 CFR 1311.42 (1975).

[229] 21 U.S.C. §958(h).

[230] 21 CFR 1311.42(a) (1975).

An agency's decisional law nevertheless constitutes a body of precedent that is of interest to persons subject to the agency's authority. The unannotated regulations collected in the Code of Federal Regulations do not provide a complete picture of an agency's operative law. To assist the user of the Code to obtain fuller information, each agency should list at the head of the title or chapter assigned to it in the Code those agency publications that contain the agency's orders and opinions in adjudicatory proceedings. The banking agencies whose regulations appear in Title 12 of the Code have long observed this practice. Any supplementary publications listed by an agency should then be described in greater detail in the agency's published regulations. The Federal Communications Commission, for example, describes in detail in Part 0 of its regulations the content of the Commission's various publications, including the FCC Reports.[231] The case law in the Reports is indexed both by subject matter and by CFR section cited. Many agencies, however, do not publicize the existence of their official publications or index their case law in this fashion.

The Federal Register can safely restrict itself to its traditional role of publishing proposed and final rules and notices of hearings or opportunities to be heard if this limited informational role is supplemented by other informational sources that publish and digest each agency's case law. The strengthening of each agency's system for publicizing its case law is clearly preferable to an expansion of the centralized role of the Federal Register System because the great majority of the thousands of adjudicatory orders and opinions released annually by the Federal Communications Commission and many other agencies and published in bulky agency reports are sufficiently routine in applying settled principles to the particular facts of the case to be of interest only to the parties involved or to specialists. This is likely to be the case if the agency articulates its basic policies in published rules and policy statements of general applicability. However, if an agency announces in an adjudicatory opinion a significant new policy that it intends to apply generally, it would be appropriate and desirable for the agency to publish in the Rules and Regulations section of the Federal Register a statement of general policy informing the public of its new policy and of its intent to apply it in future proceedings. The Federal Register document should cite the relevant decision and summarize the new policy in generalized rule form without reprinting the text of the opinion. Federal agencies have so far declined to adopt this approach, but the Federal Communications Commission at least warns users of the Code of Federal Regulations that the Federal Register System is not a complete informational system and that "Commission decisions and other Commission documents not entitled formal policy statements or interpretations may contain substantive interpretations and statements regarding policy, and these are published as part of the document in the FCC Reports." [232] (For further consideration of the changes suggested in this paragraph see those portions of this report accompanying paragraph B of the Recommendation.)

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[231] 47 CFR 0.411, 0.416, 0.445 (1974).

The remainder of paragraph C of the Recommendation attempts to formulate the proper role of the Federal Register in publishing notices of applications, hearings and other pending adjudicatory matters. Federal Register notices are public notices and not a means of giving notice to the parties to the proceeding. Thus, subparagraph C(2) provides that notices of adjudicatory matters should be published in the Federal Register only if they are intended to inform interested persons who are not personally notified as parties to a proceeding of the opportunity to comment or otherwise participate in the proceeding. Hearings in disciplinary, enforcement and other proceedings where public participation is inappropriate should not be noted in the Federal Register.[233]

This criterion, it must be recognized, will not significantly reduce the number of notices presently published in the Federal Register. While the format of many published notices needs to be altered, the great majority of notices published in the Federal Register are public notices intended to inform interested non-parties of pending adjudicatory matters. One of the few categories of notices likely to be excluded under the criterion in subparagraph C(2) is the Drug Enforcement Administration's notices of hearings on the denial, suspension or revocation of registrations by named manufacturers or physicians to distribute controlled substances.

Subparagraph C(3) of the Recommendation therefore suggests an additional, prudential limitation on the use of the Federal Register to publish notices of pending adjudicatory matters. Specific categories of notices (for example, notices of applications or hearings under a specific statutory provision) should not be published in the Federal Register if their publication is unlikely to inform interested persons of pending adjudicatory proceedings who otherwise would not receive actual notice thereof. Several of the more voluminous categories of notices presently published in the Federal Register might be deleted under this criterion since the persons interested in the proceedings comprise a relatively discrete group whose members could be notified with equal or greater effectiveness through the use of mailing lists or other notice giving techniques by the agency. Conservation groups interested in endangered species permits, domestic manufacturers interested in applications for the duty-free importation of equipment of scientific value, and competing carriers and shippers interested in motor carrier applications very likely fall into this category. Paragraph C(3) recognizes, however, that it still may be appropriate to use the Federal Register to publish these categories of notices so long as the Federal Register notices supplement whatever other forms of public notice are practicable. Persons interested in particular categories of notices often choose to subscribe to the Federal Register because it is a comparatively inexpensive source of guaranteed reliability for obtaining these notices. Federal Register notices are read, and public participation is not necessarily furthered by eliminating a notice-giving device that is relied on and used by many public participants.

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[232] 47 CFR 0.445(d) (1974).

[233] "Public participation in enforcement proceedings, license revocations or other adjudications where the issue is whether the charged respondent has violated a settled law or policy should be permitted only after close scrutiny of the effect of intervention or other participation on existing parties." ACUS Recommendation 71–6(A)(2) on Public Participation in Administrative Hearings, 2 ACUS *Recommendations and Reports* 37.

The prudential limitation in subparagraph C(3) on the publication of notices on adjudicatory matters nevertheless serves an important function, particularly in deciding whether to publish additional categories of notices in the Federal Register. Once a category of notices appears in the Federal Register, reliance on the Federal Register by potential public participants becomes a matter of habit. Certainly many new categories of public notices could appropriately be published in the Federal Register. Applications filed with the Civil Aeronautics Board by scheduled airlines to amend their certificates of convenience and necessity by adding or deleting a particular route or service provide a prime example. These route applications are certainly of greater public interest than motor carrier applications filed with the Interstate Commerce Commission. They are also far less numerous. Notices of route applications, however, are not published in the Federal Register, but the applications are only listed in the weekly "Notice of Applications or Amendments Thereto" released by the Board's Publication Services Section.[234] Interested competitors, government bodies and airport authorities receive notice of applications in this fashion, but airplane passengers are not likely to learn (at least not directly) of applications that interest them. Section 401(c) of the Civil Aeronautics Act [235] requires that upon the filing of a route application "the Board shall give due notice thereof to the public by posting a notice of such application in the office of the Secretary of the Board and to such other persons as the Board may by regulation determine." While it would seem appropriate for the Board by regulation to require the publication in the Federal Register of notices of route applications in order to better inform interested persons of the opportunity to support or oppose a particular application, at some point the cost of printing additional Federal Register pages and the growing bulk of the Federal Register outweighs any marginal increase in the public notice afforded. If other notice giving techniques are working effectively to inform interested persons of pending adjudicatory matters, Federal Register notices are superfluous. Whether cost and other prudential considerations militate against the use of the Federal Register depends on the types of notices involved and whether other notice giving techniques (e.g., mailing lists) are likely to be equally as effective. Present publication practices suggest more instances of over-inclusion than under-inclusion of notices in the Federal Register.

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[234] This publication is described in the Board's regulations. 14 CFR 384.8(d) (1975). See text at n.104 *infra*.

[235] 49 U.S.C. §1371(c).

The prudential limitation contained in subparagraph C(3) of the Recommendation therefore recognizes that it is neither necessary nor desirable to publish all public notices of adjudicatory matters in the Federal Register. The Federal Register System, however, should at least perform the centralized notice-giving function of identifying all categories or types of public notices that are issued by agencies to inform interested persons of adjudicatory matters. Subparagraph C(3) suggests that the Office of the Federal Register publish in the monthly, quarterly and annual indexes of the daily Federal Register a composite list of the categories or types of public notices issued by each agency. The list or lists should designate which public notices appear in the Federal Register and which do not so that users of the Federal Register may quickly learn when it is necessary to seek other sources of public notice. If printing these lists in the indexes proves impracticable, each agency could list its categories of public notices with its supplementary publications at the head of the title or chapter assigned to it in the Code of Federal Regulations. Alternatively, a composite list for all agencies could be published in the Finding Aids volume of the Code. In all cases individual agencies should have the responsibility for compiling these lists and for describing in greater detail in their published regulations the nature and distribution of their various public notices. While the published regulations of most agencies presently describe the notice-giving techniques employed by the agency, they do not highlight how interested persons may "plug into" those portions of the system that interest them. Subscribers to the Federal Register should be able to quickly determine that notices of air route applications do not appear in the Federal Register but that such notices may be obtained from the Publication Services Section of the Civil Aeronautics Board. While a Board regulation [236] does indicate that members of the public may subscribe through the Publication Services Section to a weekly "Notice of Applications or Amendments Thereto," the regulation does not further identify the categories or types of notices published therein, even though the weekly notices themselves attempt to categorize the various public notices.

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[236] 14 CFR 384.8(d) (1975).

Discussion of Paragraph D of Recommendation on Format for Publication in the Federal Register of Notices on Adjudicatory Matters. Paragraph D of the Recommendation seeks to reduce the bulk and improve the useability of the daily Federal Register by suggesting changes in the format of published notices. Subparagraph D(2), which deals with the appropriate time for publishing notices in the Federal Register, may initially seem to be out of place, but the questions of timing and of selective publication of individual notices treated in that subparagraph are integrally related to the broader questions of the proper form for notices published in the Federal Register (subparagraph D(1)) and of the desirability of dividing the present daily Federal Register into separate publications (subparagraph D(3)) . The case histories of the Civil Aeronautics Board and the Federal Communications Commission, discussed in some detail below, demonstrate this interconnection. The experience of those agencies also indicates that there is no quick and easy answer to the question of what public notices should appear in the Federal Register just as there is no quick and easy solution to the problem of the Federal Register's bulk. The Recommendation can do no more than provide guidelines for individual agencies and officials of the Federal Register to consider in charting the future course of the Federal Register System.

Paragraph D(1) provides that Federal Register notices on adjudicatory matters should adopt a public notice format. The document or notice that appears in the Federal Register should briefly inform interested persons of the nature of the proceeding, the agency's legal authority, the matters of fact and law asserted, and the opportunities available to comment or otherwise participate in the proceeding. The notice should also identify an agency official whom interested persons may contact for additional information. The published notice should not ordinarily contain the text of any agency order or opinion or a detailed description of the legal or factual contentions of the agency or other parties to the proceeding.

The text of an interlocutory opinion by an agency in an adjudicatory proceeding is not a suitable document for Federal Register publication under this criterion. The numerous interlocutory opinions on hearing issues published in the Federal Register by the CAB, FCC, FDA, FPC, SEC and other agencies have an undesirable cumulative effect on the bulk and orderliness of the Federal Register; their publication is also inconsistent with the Federal Register's basic purpose of affording public notice. While an interlocutory opinion ordering a hearing in an adjudicatory proceeding and designating hearing issues does serve an important notice giving function by informing parties to the proceeding of the agency's thinking (it constitutes in effect the agency's "complaint"), the text of an opinion is not an appropriate form of public notice. The opinions that are published often do not even inform interested persons of the opportunities available to comment or otherwise to participate in the proceeding or identify the agency official or office where potential public participants should direct further inquiries. Many opinions fill four or five Federal Register pages. The substitution of an appropriate public notice format should reduce the number of pages in the Federal Register and improve the quality of the notice afforded to interested persons. A brief notice describing the proceeding in terms intelligible to a layman is likely to be more informative to the public than the text of an agency's order or opinion.

Under this recommendation, the public notices appearing in the Federal Register will usually be quite different in form than the notice afforded the respondent or other parties to the proceeding. Formal complaints, bills of particulars, and other statements of the agency's factual and legal contentions may be necessary to give adequate notice to the parties of the matters of fact and law asserted by the agency,[237] but there is no reason to publish these documents in the Federal Register. Likewise, an agency's responsibility to give adequate notice to the parties to a proceeding does not terminate upon the service of the complaint or other document designating the issues in the proceeding, but continues throughout the proceeding.[238] The Federal Register notice, on the other hand, should primarily inform interested persons of the existence of a proceeding and of the opportunities available to participate. Interested persons who wish to participate may then obtain more detailed notice from the agency itself.

Section 554(b) of the Administrative Procedure Act provides that persons entitled to notice of an on-the-record adjudicatory hearing "shall be timely informed of 1) the time, place and nature of the hearing; 2) the legal authority and jurisdiction under which the hearing will be held; and 3) the matters of fact and law asserted. . . ." [239] The public notice format suggested in paragraph C(1) should adequately notify interested persons of these matters. There is no requirement, however, that the Federal Register document itself contain all this information. Courts have upheld the adequacy of Federal Register notices that summarize the matters of fact and law asserted [240] or that refer interested readers to other material not published in the Federal Register.[241] It is enough that the

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[237] *Morgan v. United States*, 304 U.S. 1 (1937) (Morgan II).

[238] Judge Leventhal has indicated in the context of a proceeding for the withdrawal of the approval of a new animal drug application that "notice that may be 'adequate' for the purpose of scheduling a hearing is not necessarily adequate for the purpose of beginning a summary judgment proceeding." *Hess & Clark, Division of Rhodia, Inc. v. FDA*, 495 F.2d 975, 984 (D.C. Cir. 1974).

[239] 5 U.S.C. §554(b).

[240] *Braswell Motor Freight Lines v. United States*, 274 F.Supp. 674 (N.D. Tex. 1967) (three judge court) (Federal Register notices must be brief and not cumbersome); *Buckner Trucking, Inc. v. United States*, 354 F.Supp. 1210 (S.D. Tex. 1973). In *Bank of Commerce v. Board of Gov. of Fed. Res. Sys.*, 519 F.2d 164 (10th Cir. 1975), the court upheld without any discussion on the point the adequacy of a Federal Register notice that tersely summarized the facts asserted by the applicant.

[241] *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646 (1st Cir. 1974) (consultants' studies cited in notice of proposed rule making properly considered part of notice).

Federal Register notice reasonably alert the reader of the existence of adjudicatory proceedings that affect his interests so that he can take action to protect those interests.[242]

Many hearing notices presently published in the Federal Register also do not specify the exact time and place of the adjudicatory hearing which is a required part of the notice under section 554(b). In most such instances those matters have not yet been finally determined at the time the notice is published. Interested persons that respond to the notice by indicating a desire to participate in the proceeding are of course personally notified of the time and place of the hearing and any rescheduling thereof and may obtain more detailed information on the matters of fact and law at issue. Such arrangements appear to be satisfactory. While a few agencies publish notices in the Federal Register scheduling and rescheduling hearing dates and locations for adjudicatory proceedings,[243] this practice is unnecessary and any expansion of it to cover the scores of adjudicatory hearings conducted daily throughout the federal establishment could wreck havoc with the Notices section of the Federal Register.

Subparagraph D(2) of the Recommendation provides that agencies that do use the Federal Register to publish notices of adjudicatory matters should publish them as early in the proceeding as practicable to afford the maximum opportunity for public participation. Notices often appear in the Federal Register subsequent to the time that public participation in the proceeding is likely to have its greatest impact. The Civil Aeronautics Board, for example, publishes notices of hearings ordered by the Board on pending route applications, but does not publish notices of the applications themselves. Ozark Air Lines applied on September 20, 1974, for an amendment to its certificate of public convenience and necessity to delete service to and from Clinton, Iowa. On the same day it petitioned the Board to accomplish this change by a show cause procedure and to grant a temporary suspension of service pending final Board decision. Readers of the Federal Register first learned of Ozark's application and petition on January 8, 1975, when the Board published a notice containing the text of its January 3, 1975, order denying the petition and setting the application for a hearing before an administrative law judge on specified issues.[244] The Board's decision published in the Federal Register summarized the answer filed by governmental and airport officials from Clinton in opposition to Ozark's application and petition and recited the factual issues that needed to be resolved at the hearing, but did not inform interested persons that they could, in accordance with the Board's rules, petition to intervene in the hearing as a party [245] or participate in the hearing as a non-party by giving evidence or making a written submission.[246] It is often more important for interested persons to receive notice of the application than notice of the hearing because the application is likely to be granted without a hearing unless interested persons oppose it.[247] The applicable statute, section 401(c) of the Civil Aeronautics Act,[248] requires that upon the filing of a route application "the Board shall give due notice thereof to the public by posting a notice of such application in the office of the Secretary of the Board and to such other persons as the Board may by regulation determine." The Board could well decide to use the Federal Register selectively to publish notices of those applications. Of course, the filing of Ozark's application and petition was noted in the Board's weekly "Notice of Applications or Amendments Thereto" and that publication may serve as the functional equivalent of a special edition of the Federal Register. However, if it is sufficient public notice to publish a notice of an application in the Board's special publication, it should also be sufficient public notice to publish a notice of an hearing on the application in that publication without publishing it in the Federal Register.

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[242] See cases cited in nn. 240 and 241.

[243] See the CAB notices postponing hearings in 40 FR 826, 1118 and 1296.

[244] 40 FR 1551.

[245] 14 CFR 302.15 (1975).

The Federal Communications Commission has likewise not generally used the Federal Register to give public notice of license applications. Section 309(b) of the Communications Act [249] requires that the Commission give "public notice" of all radio applications and substantial amendments thereto at least thirty days prior to granting them but does not expressly require publication of any notices of applications in the Federal Register. Until recently, the Commission only noted in the Federal Register two varieties of applications: common carrier applications for domestic public radio services (rural radio services, point-to-point microwave radio service, public land mobile radio service, etc.) [250] and standard (AM radio) broadcast applications for new stations (or for major power changes in existing stations) near the top of the processing list that will be available and ready for processing on a specified date not less than thirty days after the date of publication.[251] These notices appeared irregularly in the Federal Register (roughly once per month) and were not intended to afford general public notice of the applications but to impose a time limit on the filing of mutually exclusive applications. Pursuant to the Commission's rules, mutually exclusive applications were not considered or consolidated for a hearing with an application noted in the Federal Register unless the competing application was substantially completed and tendered for filing by the date designated in the notice.[252] The

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[246] 14 CFR 302.14 (1975).

[247] See the notice of a Board order granting without a hearing Allegheny Airlines unopposed application to delete Sandusky, Ohio, as an intermediate point on a route. 40 FR 2250 (January 10, 1975).

[248] 49 U.S.C. §1371(c).

[249] 47 U.S.C.§309(b).

[250] For an example, see 40 FR 5393 (February 5, 1975).

[251] For an example, see 40 FR 5397 (February 5, 1975). 47 CFR 1.571(c) (1974) requires the publication of these lists in the Federal Register.

[252] 47 CFR 1.227(b) (1974) and 1.591(b) (1974).

Commission has recently extended these procedures to cover most applications for FM and TV broadcast licenses,[253] but transfer and renewal applications are still not noted in the Federal Register despite the wide public interest in the qualifications and performance of commercial broadcasters.[254] The Public Notices issued by the Commission listing all broadcast applications and major amendments thereto which have been accepted for filing do not appear in the Federal Register or the FCC Reports. The regulations only announce that the Commission's Office of Public Information issues these Public Notices at regular intervals.[255] Notices are released by that Office at least twice per week and normally contain four or five pages and list several dozen applicants. Copies may be picked up at the Office. This is done by law clerks or by commercial services for distribution to their clients.

The orders designating applications for a hearing that are published in the Federal Register come too late to afford effective public notice because the Commission grants most applications without a hearing. The Commission is only required to hold a public hearing on an application if a substantial and material question of fact is presented or if the Commission is for any reason unable to make the finding that the public interest, convenience and necessity will be served by granting the application.[256] Otherwise, the Commission may grant the application at any time after the expiration of the thirty days notice period required by section 309(b).[257] Parties in interest who are potential intervenors in any hearing ordered by the Commission must themselves seek a hearing on an application by filing a petition to deny. Under the Commission's rules, petitions to deny must be filed within 30 days of the public notice that an application has been accepted for filing or, in the case of new applications for standard, FM, and TV licenses, within 30 days of the Federal Register notice that the application is at the top of the processing list.[258] The Commission's rules also provide that any person may file an informal objection to the grant of a license at any time before the Commission acts on the application for the license.[259]

Since information presented to the Commission in petitions to deny or in informal objections may influence the Commission to order a hearing on an application, it would seem that adequate public notice of applications is equally important if not more important than adequate public notice of designated hearings. Section 311(a) of the Communications Act [260] does require a broadcast applicant to give notice in the principal area to be served of the filing of an application and of any hearing designated on the application. The Commission, which is instructed by that section to prescribe by rule the form, manner and frequency of the notice, has imposed on applicants elaborate requirements for publishing notices in local newspapers and, in the case of applicants who already have licenses, for broadcasting notices over the airwaves.[261] Notices prepared by a renewal applicant must inform persons that they may file comments or petitions with the Commission relating to the renewal application and to whether the licensee has operated in the public interest. While the notice need not inform interested persons how to file comments or petitions, it must indicate that persons may obtain further information on the Commission's broadcast license renewal process from the licensee's public inspection file or from the Commission. Hearing notices prepared by initial applicants, on the other hand, must inform members of the public of the opportunity to give evidence at the hearing on the specified issues, but need not inform parties in interest that they may petition to intervene as parties to the hearing and seek to enlarge the hearing issues.

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[253] 40 FR 28454 (August 8, 1975).

[254] The FCC received 61,322 complaints and 23,203 comments and other inquiries about broadcast programs during fiscal 1973. FCC, *Annual Report Fiscal Year 1973* 220.

[255] 47 CFR 1.564(c) (1974).

[256] 47 U.S.C. §309(c).

[257] 47 U.S.C. §309(b); 47 CFR 1.591(a) as amended in 40 FR 28457 (July 7, 1975).

[258] 47 CFR 1.580(i)(1974) as amended in 40 FR 28457 (July 7, 1975). Section 309(d)(i) of the Communications Act, 47 U.S.C. §309(d)(i) (1970), authorizes the Commission to impose by rule a cut-off date for petitions to deny of not less than 30 days from issuance of the public notice of the application.

[259] 47 CFR 1.587 (1974).

[260] 47 U.S.C. §311(a).

The notice giving techniques imposed on applicants by the Commission's rules are most likely more effective in affording public notice in the locality served or to be served by the applicant than any notices published in the Federal Register. Notices published in the Federal Register and circulated nationwide may nevertheless supplement quite usefully the local notices prepared by the applicant. Any notices published in the Federal Register should focus on informing interested persons of the nature of the application or hearing and on the opportunities available to participate in the proceeding by filing informal objections or petitions to deny against an application or by giving evidence or petitioning to intervene at a hearing. If the Commission does decide to use Federal Register notices as a supplementary notice giving technique, it does seem mistaken to publish notices or orders designating hearings on applications if the applications themselves were not noted in the Federal Register, since the opportunity to be heard on an application is equally as important as an opportunity to participate in any hearing ordered by the Commission.

Separate Federal Register Publications. The size of the daily Federal Register reflects the level of federal regulatory activity. Substantial reductions in the Federal Register's present bulk are simply not possible unless there is an equivalent reduction in government regulation. The present debate over deregulation raises substantive issues that are beyond the scope of the Recommendation, and the size of the Federal Register is of course a symptom and not a cause of any over-regulation that does exist. Subparagraph D(3) of the Recommendation therefore recognizes that the most promising solution to the problem of the daily Federal Register's bulk (assuming there is no decrease in the level of government regulation) is to divide the present unitary publication into component parts that are suitable for separate publication. These separate publications would continue to be part of the Federal Register but would be available at a special subscription price. There would still be a single Federal Register published daily, but subscribers would have the choice of receiving the entire Federal Register or only those parts that interest them. The Administrative Committee of the Federal Register has ample statutory authority to implement this recommendation by determining the component parts of the Federal Register that are suitable for separate publication. Section 6 of the Federal Register Act authorizes the Committee to determine "the manner and form in which the Federal Register shall be printed" and "the prices to be charged for individual copies of, and subscriptions to, the Federal Register." [262]

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[261] See section 1.580 of the Commission's rules, 47 CFR 1.580 (1974), on local notice of the filing of broadcast applications, and timely filing of petitions to deny them; and section 1.594, 47 CFR 1.594 (1974) on local notice of designations for hearing.

Subparagraph D(3) recommends that the Administrative Committee of the Federal Register designate those categories of notices on adjudicatory matters that are suitable for separate publication. Bulky categories of notices that interest a limited audience are likely to be suitable for separate publication. Thousands of truckers and shippers subscribe to the Federal Register in order to receive notice of motor carrier applications, while hundreds of manufacturers of scientific equipment subscribe in order to receive notice of applications for the duty-free importation of articles of scientific value. Many of these subscribers are interested only in these items and would not subscribe to the remainder of the Federal Register if they could separately subscribe to the particular category of notices that interest them. Conversely, the great majority of subscribers to the Federal Register have no interest whatsoever in motor carrier applications or applications for the duty-free importation of scientific equipment. If those categories of notices required a separate subscription fee, the number of subscribers to them would be small in comparison with the total number of Federal Register subscribers. Subparagraph D(3) therefore contemplates a core Federal Register with various subsidiary, specialized publications that contain notices on adjudicatory matters. The core publication containing the presidential documents, rules and regulations, and proposed rules would fulfill the Federal Register's primary function of providing the general public with a readily available source of information on each agency's operative law and proposed changes therein. The entire Notices section would itself be treated under subparagraph D(3) as a separate publication. This distinction between core and subsidiary publications reflects the Federal Register's primary role as an official depository and readily available source of agency law and its ancillary function of providing a centralized source for public notices on applications, hearings and other adjudicatory matters.

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[262] 45 U.S.C. §1506.

REPORT IN SUPPORT OF RECOMMENDATION 76-3

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"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*

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By its terms the Administrative Procedure Act[1] (APA) divides all rulemaking by federal agencies into two categories: "informal" or "notice-and-comment" rulemaking under section 553, and "formal" or "on-the-record" rulemaking under sections 556 and 557. An agency must use formal rulemaking when "rules are required by statute to be made on the record after opportunity for an agency hearing."[2] In such instances rules must be supported by substantial evidence in the "record."[3] In addition, parties to the proceeding are entitled to "conduct such cross-examination as may be required for a full and true disclosure of the facts," although this may be curtailed when a party will not "be prejudiced thereby."[4] In notice-and-comment rulemaking, by contrast, there is no requirement that the rule be based upon evidence in a record.[5] And section 553 does not mention cross-examination: an agency need only afford "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[6]

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* This paper is the outgrowth of work I undertook as a consultant to the Committee on Judicial Review of the Administrative Conference of the United States. Neither the Conference nor the Committee has approved this paper, but recommendations deriving from the study have been approved by the Committee on Judicial Review. I am indebted to the chairman of the Committee on Judicial Review, William H. Allen, to William F. Pedersen, and to my colleague Alfred T. McDonnell, for innumerable constructive suggestions.

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[1] 5 U.S.C. §§ 551-706 (1970).

[2] *Id.* § 553(c).

[3] *See id.* § 706(2)(E).

[4] *Id.* § 556(d).

[5] California Citizens Band Ass'n v. United States, 375 F.2d 43, 54 (9th Cir.), *cert. denied,* 389 U.S. 844 (1967). *But see, e.g.*, cases cited at notes 7-8 *infra*; *cf.* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-15 (1971).

This article deals with several recent judicial decisions that have ordered an agency—despite the inapplicability of sections 556 and 557—to afford opponents of a rule substantially greater procedural opportunities than are prescribed by section 553. The challenging parties in these cases have successfully asserted two distinct types of rights: first, a somewhat qualified right of cross-examination;[7] and second, a right of access to details of the agency's methodology, thus permitting that methodology to be subjected to meaningful criticism.[8] None of these cases relied on the APA's procedural requirements concerning formal rulemaking;[9] indeed, several of the opinions showed no inclination to rule that the particular decision-making process in contention fell anywhere within APA classifications.[10] Thus, with only a little help from Congress, the courts seem to have created a procedural category that might be termed "hybrid rulemaking" or "notice-and-comment-plus."

This article has several purposes: first, to explore in a general way the differences between fact-finding used for promulgating a rule and fact-finding used for applying a pre-existing rule; second, to consider under what legal theories, and in what circumstances, a court may be justified in imposing procedural burdens upon an agency engaged in rulemaking; third, to describe how selected cases[11] have actually influenced the agencies involved, and to assess empirically the effectiveness and costs of the procedures prescribed; and, finally, to suggest some considerations that might bear on the propriety of similar judicial intervention in the future.

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[6] 5 U.S.C. § 553(c) (1970).

[7] International Harvester Corp. v. Ruckelshaus, 478 F.2d 615, 629-31, 649 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 503 (4th Cir. 1973); Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1260 (D.C. Cir. 1973) (*semble*) (requiring "the process of testing and illumination ordinarily associated with adversary, adjudicative procedures").

[8] Public Serv. Comm'n v. FPC, 487 F.2d 1043, 1071, 1098 (D.C. Cir. 1973), *vacated and remanded*, 417 U.S. 964 (1974); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1260, 1268 (D.C. Cir. 1973) (*semble*); International Harvester Corp. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973).

[9] *See, e.g.*, Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1250-51 (D.C. Cir. 1973) (denying that formal rulemaking requirements applied); International Harvester Corp. v. Ruckelshaus, 478 F.2d 615, 630 n.48 (D.C. Cir. 1973) (same).

[10] In Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973), the Fourth Circuit declared:

> It is idle, and fruitless, to boggle over the appropriate classification of the Administrator's action, though we cannot avoid observing that the Administrator, in his order of approval, described his action as "rulemaking". Modern precedent has discarded such classifications as criteria for determining the type of hearing to which the parties affected by administrative action are entitled . . . .

Id. at 500. *See also* Public Serv. Comm'n v. FPC, 487 F.2d 1043, 1069 (D.C. Cir. 1973), *vacated and remanded*, 417 U.S. 964 (1974) (declining to reach the problem of classifying); Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971) (ignoring the issue). *But see* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 n.67 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (identifying the rulemaking as informal).

I. Prologue: The Distinctive Nature of Fact-Finding for the Purpose of Promulgating Rules

A misunderstanding of the facts can be as unfortunate in developing a rule of law as in determining whether defendant breached his contractual duty to plaintiff. *Lochner v. New York*[12] is a classic instance. Without any detailed factual inquiry, and without any serious review of the legislature's factual inquiry, the Court resolved the constitutionality of a statute limiting the working hours of bakers; an apparently crucial part of its decision was an empirical assertion about whether work in a bakery posed significant risks to the bakers' health.[13]

Yet courts have rarely intervened to assure that parties adversely affected by administrative rulemaking will have an adequate opportunity to challenge the factual assumptions underlying the rules. This judicial reluctance may be explained by the differences in the institutional setting and intellectual processes that are involved in fact resolution for rulemaking purposes, on the one hand, and for adjudicative purposes, on the other.

Justice Holmes's opinion in *Bi-Metallic Investment Co. v. State Board of Equalization*[14] is the most salient intellectual antecedent of "informal" rulemaking procedures, and it focuses directly on the institutional setting. On the theory that tax assessments in Denver were, as a whole, radically lower than assessments in the remainder of Colorado, the State Board of Equalization and the Colorado Tax Commission had ordered an across-the-board increase of forty percent in valuations of taxable property in Denver. The Supreme Court held that the plaintiff, a Denver taxpayer, had no right to a hearing before either state agency. Holmes wrote:

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[11] Cases cited notes 7-8 *supra*.

[12] 198 U.S. 45 (1905).

[13] *Id.* at 59.

[14] 239 U.S. 441 (1915).

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.[15]

In its assumption that a "hearing" is infeasible when the interests of many people are at stake, the argument is inadequate on its face. Of course each person affected by a general rule cannot individually enjoy the type of hearing associated with adjudication. But an agency can nevertheless permit a suitable champion to represent the entire group (or each of several conflicting interest groups). Class actions are and always have been built upon the feasibility of such techniques.[16] And in recent times the concept of representation has been used to justify relaxing the prerequisites of standing to sue administrative agencies.[17]

A second dimension to Justice Holmes's concern about the numbers affected is more plausible: the possibly greater utility of the political process as a check upon administrative error. When a single citizen is the victim of an erroneous adjudicative decision the prospect of political relief is remote. With an increase in the number of persons adversely affected, the chance of political relief may, *ceteris paribus*, rise proportionately. Recent history gives some support to Justice Holmes's assumption. Just in the past year, two regulations originally promulgated in the interests of health and safety—Environmental Protection Agency (EPA) rules calling for parking surcharges in order to diminish center-city air pollution,[18] and Department of Transportation rules requiring auto makers to install devices that disable a car from operating unless safety belts are fastened[19]—have been withdrawn as a result of adverse political pressure.

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[15] *Id.* at 445.

[16] *See, e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853); Hichens v. Congreve, 4 Russ. 562, 38 Eng. Rep. 917 (Ch. 1828); Good v. Blewitt, 13 Ves. Jun. 397, 33 Eng. Rep. 343 (Ch. 1807); Chancey v. May, Prec. Ch. 592, 24 Eng. Rep. 265 (Ch. 1722). In *Bi-Metallic* itself, the Denver assessor was available as such a champion; having been joined in the suit, he objected to the "equalization" decree and complained that he had not been afforded an opportunity to be heard. 239 U.S. at 444.

If mere numbers were dispositive, it would seem to follow that in class actions the class or even its champion should have no constitutional right to the procedural benefits of an adjudicative hearing. Yet no one suggests such a result. *See* Supreme Tribe of Ben-Hur v. Cauble, *supra*.

[17] *See* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616-17 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

But even here there are some grounds for doubt. The relative rarity of clear-cut examples, and the fact that the rules in the two above examples directly affected vast numbers of people, point up the limited availability of political relief. To be sure, the possibility of legislative intervention, presumably often mirroring public sentiment, sometimes operates prophylactically to prevent an agency from adopting socially unacceptable rules. Even preliminary steps towards legislative activity, such as subcommittee hearings, may cast a shadow on agency zeal. But for vast areas of decision making normally classified as legislative rather than adjudicatory, one must retain serious doubts about the efficacy of the political check, particularly in view of the tortuous path of legislation, and the enormous number of rules being promulgated by administrative agencies.

Justice Holmes's distinction may appear in a still more plausible light if the intellectual processes involved in fact-finding for rulemaking purposes are compared with those employed in adjudication.[20] Both types of decision involve (1) gathering evidence in the form of sense perceptions, and (2) drawing inferences from the perceptions. Consider first an example of adjudication—a simple automobile negligence case—in which the plaintiff claims, through largely circumstantial evidence, that the accident was due to the defendant's drunken driving. Witnesses may testify to their experiences in terms of certain raw perceptions: witness *A* that he perceived tire marks on the pavement in a certain configuration; witness *B* that he saw the defendant stagger from a tavern ten minutes before the accident; witness *C* that he examined the wrecked cars and perceived the nature of the damage to each car; witness *D* that he examined the plaintiff in the hospital and perceived the injuries to his body. If the fact-finder is to make anything of these perceptions, a second type of evidence will also be necessary. Witnesses will therefore be asked to testify to certain inferences that may be drawn from the perceptions: witness *A* may give an opinion about the speed and direction of the cars; witness *C* about the cost of repairs and other appraisable property loss; witness *D* about the expected medical expenses and disabilities of the plaintiff. The witnesses may allude to a body of established knowledge and perhaps to particular experiments and case histories to substantiate their opinions. The fact-finder will assess the credibility of the perceptions and the probability of the suggested inferences, and then determine what probably happened and how much injury resulted.

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[18] *See* 39 Fed. Reg. 1848 (1974). Ultimately, Congress passed legislation forbidding the EPA to require parking surcharges. *See* Energy Supply & Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 4(b), 88 Stat. 246 (June 22, 1974).

[19] 49 C.F.R. § 571.208 (1973).

[20] As used in this discussion, the term "adjudication" refers only to the application of rules, not to their formulation (even within an adjudicatory proceeding).

Superficially, the process of developing factual support for a proposed rule will run a similar course. In the case of a health regulation, for example, the agency may begin with studies setting forth certain raw perceptions: that a group of initially healthy rats demonstrated symptoms similar to those of cancer after exposure to a certain chemical. The agency must then determine whether to infer a significant risk to humans from the demonstrated risk to rats. Parties may offer studies purporting to show that the disputed chemical has had no carcinogenic effect on dogs or monkeys; that even for rats there is a threshold level of exposure, below which no carcinogenic effect has been perceived; or that no one has ever perceived a carcinogenic effect on humans exposed to the disputed chemical. This process, too, will raise issues concerning the accuracy of the perceptions of raw data and the plausibility of the inferences sought to be drawn. The agency will conclude with some judgment about the range of probability of cancer at various levels of exposure.

At some point, however, the intellectual process will diverge from that involved in adjudication. Because the agency's legislative mandate will almost certainly have been formulated in rather general terms (calling, perhaps, for the imposition of restrictions reasonably intended to promote human health), knowing the level of risk associated with various levels of exposure will not dispose of the issue. Trade-offs based essentially upon value judgments will be necessary.[21] By contrast, a court or jury finding facts in order to apply a rule of law is theoretically able to do so in a value-free way.[22] Authoritative statements of the rule, including where the burden of persuasion lies and how high the standard of proof is, will largely have resolved the value issues.

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[21] Suppose, for example, that a completely value-neutral fact-finder would conclude that workers exposed to a given level of the chemical will annually suffer a one-in-ten-thousand risk of contracting cancer; that the only feasible restriction of the industrial process is total prohibition; and that this process is essential for the manufacture of a medically useful drug. At this stage of rulemaking, the agency members inescapably doff their hats as value-neutral fact-finders and assume the role of legislators of values, deciding whether society should accept the cancer risk or do without the drug.

At this point Justice Holmes's readiness to limit a person adversely affected by administrative rulemaking to his political remedy takes on a slightly different coloration. The *Bi-Metallic* preference for the political remedy makes sense in comparative terms. Holmes may have meant not that the political remedy is ideal, but merely that when the ultimate issues require value judgments that are not susceptible to "proof,"[23] the check afforded by the procedural protections of a hearing may be even less worthwhile—especially when one considers the costs in time and energy involved in such procedural checks.

This is not to say that the procedural requirements associated with adjudication are of no use as a check to lawless rulemaking. Whenever the perception of raw data is at stake, or doubts are raised about the analytical underpinnings of competing inferences, those requirements may play more or less the role that they do when a rule is being applied to a historical episode.[24] But, since agency rulemak-

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The model is complicated by the fact that insertions of values into the rulemaking process do not necessarily come tidily at the end, as I have implied in the text. A scientist's expert judgment about factual probabilities is often clouded by concern about the result—concern that either a "too restrictive" or "too lenient" regulation may emerge unless the agency accepts his view as to the correct factual inference. Here mystical incantations—such as "expert opinion" or "engineering judgment"—are likely to conceal the extent to which the proposed inference is based on value judgment rather than objective analysis of probabilities. Thus, it is perhaps significant that agencies rarely use advanced methods of statistics to express their factual findings in terms of probabilities. But compare the technique employed by the EPA in the emissions suspension case, discussed in text and notes at notes 231-33 *infra*.

[22] Of course, there will be gray areas, where the rule is so ill-defined that a covert value judgment must be made in order to apply it to the fact. *Cf.* O. HOLMES, THE COMMON LAW 123-25 (1881). And judges or juries may inject their values into the fact-finding. For example, in the face of a near-certain probability of contributory negligence, they may decide for the plaintiff because of their value judgment that the risk of mistakenly denying relief to a plaintiff with a good claim is far less acceptable than the risk of mistakenly giving relief to a plaintiff without a claim. Nonetheless, it seems fair to say that values play a far less significant role in the finding of facts for the purpose of applying law than for the purpose of promulgating law.

[23] *See* Grey, Book Review, 25 STAN. L. REV. 286 (1973); Leff, Book Review, 60 VA. L. REV. 451 (1974).

[24] This is apparently what Professor Robinson meant when he wrote:

> . . . [I]t is doubtful that predictive judgment is radically different from determinations of historical fact. In both cases the determination must almost invariably rest on general conclusions that are inferred from particular factual data and an evaluation of the probabilities that may be as appropriate for testimonial proof and cross-examination in the one case as in the other.

ing involves the exercise of a delegated portion of the legislature's power to make trade-offs between competing values, the relative significance of "accurate" factual investigation is reduced. For to the extent that the agency, simply by recasting its value judgment, may achieve its original result despite being forced to correct its factual errors, the benefits that are supposed to be derived from precision are vitiated.[25]

In addition to the pervasiveness of value judgments, there is another factor that may make society less determined to achieve factual accuracy in rulemaking. It is partly captured in Judge Leventhal's epigram in the *Blocked Space*[26] case that with some issues "a month of experience will be worth a year of hearings." Seemingly, this distinction sharply delineates between adjudication and rulemaking. A party who loses an adjudication will ordinarily never benefit from anything that happens after the judgment in his case is entered;[27] the victim of an improper rule may hope that experience will show the agency the error of its ways and bring about correction. "Feedback" is possible in the rulemaking context, not in the application of a rule to a past event.

On closer examination, the distinction is not quite such a bright line. First, it ignores the unfortunate circumstance that ultimate

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Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. PA. L. REV. 485, 522 (1970).

[25] A recent decision of the District of Columbia Circuit, wrestling with the principle that "substantial evidence in the record considered as a whole" shall be the scope of review for regulations promulgated under the Occupational Safety and Health Act, 29 U.S.C. § 655(f) (Supp. 1975), analyzed the rulemaking function in somewhat similar terms. Judge McGowan wrote:

> What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another. Where that choice purports to be based on the existence of certain determinable facts, the Secretary must, in form as well as substance, find those facts from evidence in the record. By the same token, when the Secretary is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive.

Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475-76 (D.C. Cir. 1974). Judge McGowan's term "policy judgments" seems to encompass what I have refered to as value judgments—principles that cannot be "proven" right or wrong. Where value judgments were involved, therefore, the court concluded that it could only ask the Secretary to identify the considerations he had found persuasive, so that the court might be assured that he had acted in compliance with the statutory purposes. For a somewhat looser formulation of the same distinction, *see* Amoco Oil Co. v. EPA, 501 F.2d 722, 740-41 (D.C. Cir. 1974).

[26] American Airlines, Inc. v. CAB, 359 F.2d 624, 632-33 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 843 (1966).

[27] It might seem that injunctive decrees, which are frequently made modifiable by the issuing court, are an exception. But such "regulatory" decrees are actually a good deal like administrative rules.

correction of the error will not indemnify the interim losers for what they suffered before the agency saw the light.[28] Second, it may take an extraordinarily dreadful rule to make Judge Leventhal's time estimate realistic. In the *Blocked Space* case, for example, four years elapsed before the agency abandoned the rule, despite some reason to believe that the bases ultimately asserted for the reversal should have been reasonably apparent to the agency at the time of the original adoption.[29] Third, the teachings of experience (except in the most egregious cases) are likely to be subject to precisely the same ambiguities as the factual data on which the rule originally was based. If the rule fails to deliver the hoped-for results, its proponents will often be able to explain away its failure and to suggest supplementary rules that may bring about success. The absence of an effectively isolated "control group" may make it practically impossible to build an impregnable factual record against such contentions. Fourth, the establishment of a bureaucracy to implement the rule will create an institutional obstacle to repeal, tending to offset whatever advantages experience may have provided.[30]

It seems, nevertheless, that there is force to Judge Leventhal's point. And although his epigram deals with the peculiar ability of an agency to conduct a legislative experiment (adopting a rule to see how it works out), the analysis can also be applied to the agency's institutional ability to conduct all kinds of experiments, some of which may be scientific or technical, rather than legislative. The role of such experiments in rulemaking suggests several factors that further militate against making rules by using the kind of procedures associated with adjudicative fact-finding.

First, the rulemaking framework offers the possibility of discarding the results of a questionable study and conducting an improved experiment. If, for instance, someone challenges whether those who conducted a given experiment with rats measured accurately the amounts of a substance to which they were subjected, or if it is suggested that the study is flawed given the potential effects of the hypodermic needle employed, it may be possible to conduct another study that eliminates the alleged defects. Although such experimental flexibility may occasionally be possible in connection with adjudication also, the chances seem much more remote in the latter context.

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[28] Perhaps the notion that rules produced by "rulemaking" have only "future effect" accounts in part for the general disregard of this fact. *See* 5 U.S.C. § 551(4) (1970). Of course, the effects of all human decisions take place in the future, but regrettably these effects still may heavily penalize past decisions. Thus a rule purporting to have only future effect ("fossil-fueled electric plants must reduce their emissions of sulfur dioxide to so many grams per BTU equivalent of fuel used in the process") may have a devastating impact on the value of past investments—far more so than a knuckle-rapping fine for a past violation.

[29] *See* Robinson, *supra* note 24, at 530-31.

[30] In practice, the most clearcut effect of experience may be to reinforce an agency's successful initial inclination. If, for example, an agency adopts a regulation in the face of a "parade of horribles" predicted by the parties who expect to be adversely affected, and the horribles demonstrably fail to materialize, the agency may rightly be emboldened to similar ventures in the future. The peril, of course, is that the agency may misread, or exaggerate, the lessons of the first success.

Second, the sort of error in perception that is the typical target of cross-examination possesses relatively minor significance in the rulemaking framework. Almost any important experiment will involve observing a substantial number of events or conditions—for example, the health of a number of rats after various exposures to an allegedly cancer-producing substance. Although individual errors may well occur, one would expect that, in the absence of a methodological error, they would tend to cancel each other out. Consequently, there is less need for elaborate procedures to verify each observation than when the issue is, say, whether the defendant was speeding.

The *Bi-Metallic* case itself illustrates the point. Although the case involved "values" of property, one cannot argue that "value judgments" were to be made. In making property tax assessments subjective concepts of "value"—what the owner would demand for his property or any particular person might offer for it—are largely put aside in favor of a (purportedly) objective concept, "market value." Why then should Denver property owners have been denied an opportunity to contest the proposition that their properties had been undervalued by 40 percent?

The concept of experiments gives an answer. Assume that the state board employed a valuation method that would have been regarded as an acceptable analytical method given the standards prevalent at that time.[31] Presumably, this method involved comparisons between the Denver assessor's valuations and "true" market values. Miscomputations in the valuation of any particular property would tend to be of minimal significance for a large sampling; in the absence of systematic error, miscomputations in one direction would presumably tend to be offset by error in the opposite direction. Thus, the acceptability of the state board's judgment would turn upon the propriety of its method; if its method was improper, its judgment would be invalid as arbitrary or capricious, at least at some point. The Court may have felt that judicial review for arbitrariness (together with political remedies) represented sufficient protection against sloppy agency fact-finding.[32]

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[31] Neither the Supreme Court opinion nor that of the Supreme Court of Colorado offers a clue as to the method employed. State Bd. of Equalization v. Bi-Metallic Inv. Co., 56 Colo. 512, 138 P. 1010 (1914), *aff'd*, 239 U.S. 441 (1915).

This is not the place to attempt a comprehensive analysis of the line between rulemaking and adjudication for purposes of determining when the constitutional requirement of due process calls for a "hearing." But, as will be seen, the factors that have just been outlined may help to explain why the hybrid rulemaking procedures mandated by the courts have, in the end, provided very little tangible benefit to the aggrieved parties.

II. SOURCES OF JUDICIAL POWER TO IMPOSE HYBRID RULEMAKING PROCEDURES

The courts' occasional insistence that agencies observe procedural niceties not prescribed in section 553 inevitably poses a question of legitimacy. Whether the potential objection be framed in terms of "separation of powers," "jurisdiction," or whatever, it is not self-evident that the federal judiciary has any basis for giving independent regulatory agencies or branches of the executive department instructions about how they should engage in fact-gathering.

A. Section 553

We should note preliminarily that the courts have by no means explored the full reach of section 553's requirements. For example, section 553(c) requires the agency to give interested persons "an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." That provision appears to give an agency discretion to grant or withhold the chance for oral presentation; but since section 706(2)(A) authorizes a court to set aside agency action found to be "an abuse of discretion," denial of a request for oral argument could, in some cases, be held reversible error.[33]

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[32] Yet one may question whether judicial review for arbitrariness represented a feasible avenue for relief at the time of *Bi-Metallic*. It is very hard to see how the complainants in that case could have exposed any methodological error to judicial view. The requirement that agencies must make formal findings did not appear until 1922. *See* Wichita R.R. & Light Co. v. Public Util. Comm'n, 260 U.S. 48, 58 (1922). Furthermore, the complainants probably could not have made a colorable allegation that the ruling was confiscatory and thereby obtained a trial, *cf.* Chicago, M. & S.P. Ry. v. Tompkins, 176 U.S. 167 (1900), and outside the area of confiscation, apparently, judicial trial of legislative facts was still unavailable. *See* Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 211-13 (1934), and cases cited.

Section 553(c)'s requirement of an opportunity to participate could also give rise to claims that the "notice" required by section 553(b) should be broadly conceived. Although section 553(b)(3) merely requires that the notice include "either the terms or substance of the proposed rule or a description of the subjects and issues involved," an objector could argue that in some circumstances the 553(b)(3) notice should set forth not only the proposed regulation but also a statement of its factual premises and methodology, sufficiently detailed to permit objectors to make a meaningful use of their section 553(c) "opportunity to participate."[34]

B. The Constitution

The APA definition of a rule, "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . .,"[35] is so broad that it obviously must cover a number of circumstances that require adjudicatory procedures because of the due process clause. A literal reading of the APA might suggest that Congress has prescribed only "notice-and-comment" rulemaking for at least some of these situations. The Supreme Court's decision in *Wong Yang Sung v. McGrath*[36] indicates, however, that the APA itself automatically sweeps such cases into the class governed by the adjudicatory techniques of sections 556 and 557. In *Wong Yang Sung,* the Court dealt with section 554's "separation-of-functions" rule, which prohibits agency personnel involved in investigatory or prosecutorial functions from also participating in agency decision-making. By its terms, this provision applies to "every case of adjudication required *by statute* to be determined on the record after opportunity for an agency hearing,"[37] and the Court held that the prohibition also applies to an adjudication required by the Constitution—but not by statute—to be determined in that way.

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[33] *See* Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925, 946 (D. Del. 1973) (noting that the denial of an opportunity to make an oral presentation is "presumably" reviewable for abuse of discretion, but finding no abuse in the circumstances presented). It might be argued, however, that such reliance on section 706(2)(A)'s authorization of reversal for abuse of discretion would be an unwarranted extension of section 706(2)(D), which authorizes the reviewing court to overturn agency action for failure to observe "procedure required by law."

[34] Judge Leventhal relied in part on this argument in Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 n.67 (D.C. Cir. 1973).

[35] 5 U.S.C. § 551(4) (1970). *But see id.* § 551(6), which excludes licensing from the category of rulemaking.

[36] 339 U.S. 33 (1950).

[37] 5 U.S.C. § 554(a) (1970) (emphasis added).

Section 553(c) employs almost identical language: "[w]hen rules [as defined in the language quoted above] are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection." And the remedial purpose of the APA, invoked in *Wong Yang Sung* to justify a generous interpretation of section 554, would seem equally pertinent in the construction of section 553(c).[38] In most situations, therefore, when the Constitution requires something more than section 553 procedures, it will require the full gamut of procedures mandated for "on-the-record" rulemaking. On the other hand, to the extent that rules of general (as opposed to particular) applicability are concerned, the burden of *Bi-Metallic* would seem to be that the Constitution imposes no procedural constraints upon the agency—other than the restraints, if any, it might impose upon a legislature acting directly.[39]

C. The Agency's Authorizing Statute

Congress is of course free to require that an agency, in promulgating regulations, adhere to procedures superseding those of section 553, and in recent years it has often done so. These requirements have included consultation with a specific person or group, creation of and consultation with an advisory committee, and provision of an opportunity for oral testimony and argument.[40] Frequently, the Congressional message is far from clear,[41] thus leaving substantial room for judicial interpretation.

It is fair to say that the attitude of the Supreme Court toward these ambiguities has altered sharply since such decisions as *Morgan I*[42] and *Morgan II*.[43] Both addressed the question of how a statutory "full hearing" obligation affected the Secretary of Agriculture's power to set "just and reasonable" rates for stockyards. *Morgan I* found the phrase to contain the now much-diluted requirement that the one who decides the case must hear,[44] and *Morgan II* found it to encompass a requirement that the issues be formulated in advance of final decision with sufficient clarity that opponents of the proposed outcome could know what they had to oppose. In both opinions, Chief Justice Hughes characterized the proceedings as "quasi-judicial."[45] From the tenor of the opinions, one might suspect that the Court would have found that the statutory phrase "full hearing" embodied, in some degree, almost every conceivable attribute of adjudicatory proceedings.

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[38] *See* Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 791 (1974) [hereinafter cited as HARVARD NOTE].

[39] Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915). *But cf.* Appalachian Power Co. v. EPA, 477 F.2d 495, 503 (4th Cir. 1973).

[40] *See* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1313-18 (1972).

[41] *Id.* at 1319-23.

[42] Morgan v. United States, 298 U.S. 468 (1936).

[43] Morgan v. United States, 304 U.S. 1 (1938).

[44] 298 U.S. at 481.

The most recent Supreme Court interpretation of a Congressional "hearing" requirement is worlds apart. *United States v. Florida East Coast Railway Co.*[46] paralleled the *Morgan* cases in that it involved the power of an agency (here the ICC) to prescribe rates for the future. The Interstate Commerce Act[47] provided that the rate prescription should be made only "after hearing." Speaking through Justice Rehnquist, the Court held that the "hearing" requirement did not trip the case over into the section 556-557 class,[48] and, further, that the requirement was fully satisfied by a section 553 proceeding.[49] The ICC proceeding was undoubtedly "rulemaking" as defined in the APA, so that section 553 would have governed if the Interstate Commerce Act had been silent about procedures; consequently, the Court's decision rendered the latter statute's express requirement of a "hearing" completely without practical effect.

The Court's handling of an argument based upon *ICC v. Louisville & Nashville Railroad Co.*[50] superficially suggests that in other contexts a statutory requirement of a "hearing" can be read to call for more than section 553 procedures. *Louisville & Nashville* had interpreted a similar provision to require that all "parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."[51] Since the statute originally authorizing the *Florida East Coast* ratemaking proceeding had been enacted just four years after *Louisville &*

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[45] 298 U.S. at 480; 304 U.S. at 14, 18.

[46] 410 U.S. 224 (1973).

[47] Section 1(14)(a) of the Interstate Commerce Act, as amended, provides:

> The Commission may, after hearing on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid . . . .

49 U.S.C. § 1(14)(a) (1970).

[48] 410 U.S. at 234-38.

[49] *Id.* at 238-46.

[50] 227 U.S. 88 (1913).

[51] *Id.* at 93.

Nashville, the railroads in *Florida East Coast* argued that the phrase should be given the same meaning as in *Louisville & Nashville*. Justice Rehnquist rejected the argument, seemingly on the grounds that *Louisville & Nashville* involved refunds, while the rates to be fixed in *Florida East Coast* were prospective only.[52] The implication would appear to be that the meaning of the statutory term "hearing" may vary according to the nature of the decision to be made.

But this contention fails to consider a significant element of the factual situation before the Court. A ratemaking proceeding involving a refund order would not fall within the terms of section 553 at all, since rules within the meaning of the APA are limited to decisions of "future effect."[53] Thus, all we are left with is the rather tautological proposition that where an authorizing statute requires a "hearing" in a context to which section 553 is not applicable, the scope of the "hearing" is not confined to the procedures described in section 553.

It might also be argued that *Florida East Coast*'s refusal to give the word "hearing" any meaning at all is limited to statutes antedating the APA.[54] The argument would be that Congress's use of the term "hearing" in 1917 can be attributed merely to the then existing vacuum in common understanding about the normal procedures for rulemaking—a vacuum filled by enactment of the APA. The corollary would be that a "hearing" requirement in a post-APA statute has to be given *some* meaning, namely, that it requires procedures beyond those coming into effect automatically under section 553.

The difficulty with the argument is that the Court in *Florida East Coast* went to some lengths to chill any such notion. The Interstate Commerce Act had been amended in 1966 to direct the ICC to consider the impact of the rates upon the adequacy of the nation's freight car supply.[55] Because this legislative action had simply altered the substantive terms under which the ICC was to exercise its preexisting authority, the Court could have disregarded the amendment and addressed its decision only to "hearing" requirements enacted prior to the passage of the APA. Instead, Justice Rehnquist wrote: "Under these circumstances, confronted with a grant of substantive authority made *after* the Administrative Procedure Act was enacted, we think that reference to that Act, in which Congress devoted itself exclusively to questions such as the nature and scope of hearings, is a satisfactory basis for determining what is meant by the term 'hearing' used in another statute."[56] Thus the Court aggressively insisted upon treating the ICC's authorizing statute as bearing not only a 1917 date but also a 1966 one.[57]

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[52] 410 U.S. at 244-45.

[53] 5 U.S.C. § 551(4) (1970).

[54] *Cf.* HARVARD NOTE, *supra* note 38, at 794.

[55] *See* 410 U.S. at 225-31.

In sum, where Congress has required a "hearing" in a case that would otherwise be covered by section 553, it will be difficult to persuade a court after *Florida East Coast* that the "hearing" requirement calls for additional adjudicative-type procedures. Constitutional overtones or exceptionally clear statutory history might prove persuasive, but in run-of-the-mill cases the Supreme Court will likely declare that a "hearing" requirement is fully met by compliance with section 553.

A similar ambiguity is presented in statutory provisions for judicial review that establish a standard of "substantial evidence" and call for an agency to file with the court "the record upon which the order complained of was entered."[58] The Attorney General's manual on the APA viewed such provisions as making sections 556 and 557 applicable[59] and two panels of the District of Columbia Circuit have found in them a basis for requiring hybrid rulemaking in two of the cases examined in this article, *Mobil Oil Corp. v. FPC*[60] and *Public Service Commission v. FPC.*[61] On the other hand, the Tenth Circuit in *Phillips Petroleum Co. v. FPC,*[62] and another panel of the District of Columbia Circuit in *American Public Gas Association v. FPC*,[63] have seemingly rejected such contentions. The issue has been the subject of considerable scholarly comment;[64] and the Administrative Conference has expressly recommended against finding that a statutory requirement of "substantial evidence on the record" implies any sort of procedural obligation.[65] *Florida East Coast* suggests, of course, that the Supreme Court will not read ambiguous language of this kind very expansively.

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[56] *Id.* at 240 (emphasis added).

[57] Alternatively, the argument could be inverted. Working from the sentence quoted in the text, one could contend that *Florida East Coast*'s narrow reading of the "hearing" requirement should be confined to statutes enacted or reenacted after the adoption of the APA. *See* Comment, *Ratemaking by Informal Rulemaking Under the Natural Gas Act*, 74 COLUM. L. REV. 752, 759-60 (1974). But the Supreme Court's decision in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), and the references to that case in *Florida East Coast* substantially undermine the claim. In *Allegheny-Ludlum*, the Court reviewed a rule promulgated by the ICC under the same Interstate Commerce Act provision in its unamended form. The Court summarily classified the proceeding as coming under section 553. *See* 406 U.S. at 755-58. In *Florida East Coast*, Justice Rehnquist reaffirmed that holding and framed the issue before him as a question of whether the 1966 amendment justified any different result. 410 U.S. at 234-35.

[58] *See* Natural Gas Act § 19, 15 U.S.C. § 717r(b) (1970).

[59] UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL OF THE ADMINISTRATIVE PROCEDURE ACT 33 (1947) [hereinafter cited as ATTORNEY GENERAL'S MANUAL]. This passage is essentially an interpretation of the proviso of section 553(c), which makes sections 556 and 557 applicable when "rules are required by statute to be made on the record after opportunity for an agency hearing."

[60] 483 F.2d 1238, 1257-63 (D.C. Cir. 1973).

[61] 487 F.2d 1043, 1069-71 (D.C. Cir. 1973), *vacated and remanded*, 417 U.S. 964 (1974).

[62] 475 F.2d 842, 851-52 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) (despite the fact that the ratemaking in question evidently involved retroactive application, so that all

D. The Necessities of Judicial Review

As the above discussion demonstrates, and as the cases have tacitly recognized, the Constitution and specific statutory provisions often provide no firm foundation for the imposition of hybrid rulemaking requirements. But the courts have not been deterred by legislative silence. Declining to insist on direct statutory support, they have adopted a pragmatic outlook, resting their holdings on the necessities of substantive review.

The typical situation prompting this stance can be briefly sketched. No matter what the standard of review in an appeal from an agency rulemaking proceeding, the record before the court (including detailed factual allegations by the challengers) may leave room for doubt about a necessary factual predicate of an otherwise valid rule, so that the court is unable, without more, to affirm the rule. Take, for example, the primary ambient air standards that the Environmental Protection Agency is authorized to prescribe in order to "protect the public health."[66] A complete absence of any link between public health and the standard promulgated for any given pollutant will presumably be fatal to the validity of that standard. If the record compiled by the agency contains only vague and conclusory statements about the alleged link, and if a challenger offers precise factual contentions rebutting the existence of the link, the

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APA rulemaking provisions were inapplicable to that extent, *see id.* at 857 (Seth, J., dissenting)).

[63] 498 F.2d 718 (D.C. Cir. 1974).

[64] Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 247-48 (1974); Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A.L. REV. 899, 934-35 (1973); HARVARD NOTE, *supra* note 38, at 803-05.

A contention has also been advanced that a provision for judicial review of the "record," without more, triggers section 553(c)'s proviso and renders sections 556 and 557 applicable. The position has been rejected in Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 336-37 (D.C. Cir. 1968); *cf.* Hamilton, *supra* note 40, at 1322-23.

[65] *See* Recommendation 74-4, 1973-74 REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 58.

[66] Clean Air Act § 109, 42 U.S.C. § 1857c-4(b)(1) (1970).

court cannot approve the standard until factual clarification is achieved.

There are three devices for supplementing the record. The first is the main subject of this article: a remand for hybrid rulemaking. The other two are (1) trial de novo in court,[67] and (2) a remand to the agency after the manner of *Chenery I,*[68] that is, with a demand for a more precise articulation of the findings and considerations upon which the rule is based, or for a demonstration that the rule is founded on factors made relevant by the authorizing statute.

The two alternative devices require serious consideration. The option of judicial trial de novo puts the issue of hybrid rulemaking into perspective: if a court may indeed employ judicial trial, then it would appear to have, almost a fortiori, a power to remand to the agency with specific procedural instructions. The option of remand for a better statement of reasons also contributes perspective, but from a different angle: to the extent that it can assure a record sufficient for substantive judicial review, its availability militates against judicial use of the more onerous device of remanding with procedural requirements. Thus, before undertaking our discussion of whether the pragmatic justification for ordering hybrid rulemaking is well founded in reality, it is necessary to seek to define the circumstances under which the other devices serving the same goal may be more appropriate.

1. *Trial De Novo in Court.* The APA evidences a Congressional assumption that judicial trial de novo will be appropriate in some circumstances, but it does not state what those circumstances may be. Section 706(2) provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

Two recent Supreme Court opinions have given section 706(2)(F) a rather narrow reading—a reading largely at odds with the statutory history. In *Citizens to Preserve Overton Park, Inc., v. Volpe,*[69] the petitioners challenged a decision by the Secretary of Transportation that there was "no feasible and prudent alternative" to the use of some Memphis parkland for highway construction.[70]

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[67] *See* text and notes at notes 215-17 *infra* for a discussion of the problem of finding a basis for district court jurisdiction for this purpose.

[68] SEC v. Chenery Corp., 318 U.S. 80, 93-94 (1943).

[69] 401 U.S. 402 (1971).

[70] That finding was a prerequisite to the use of federal funds for the highway. Transportation Act of 1966 § 4(f), 49 U.S.C. § 1653(f) (1970); Federal-Aid Highway Act of 1968 § 18(a), 23 U.S.C. § 138 (1970).

The Court expressly rejected the plaintiffs' claim of a right to trial de novo:

> Petitioners' alternative argument also fails. *De novo* review of whether the Secretary's decision was "unwarranted by the facts" is authorized by § 706(2)(F) in only two circumstances. First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. H.R. Rep. No. 1980, 79th Cong., 2d Sess. Neither situation exists here.[71]

The Court instead ordered a remand to the district court "for plenary review of the Secretary's decision," a review that might "require the administrative officials who participated in the decision to give testimony explaining their action."[72] *Camp v. Pitts*[73] took a similar view of section 706(2)(F). An applicant for a charter authorizing a new bank[74] challenged the Comptroller of the Currency's denial of the application. The Court held that the district court's holding of trial de novo on the merits was error, and ordered the case remanded for an inquiry of the type prescribed by *Overton Park.*[75]

The *Overton Park* Court's citation to the House Judiciary Committee report on the APA is curious. The report had summarized the meaning of section 706(2)(F) in this way:

> In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court.[76]

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[71] 401 U.S. at 415.

[72] *Id.* at 420.

[73] 411 U.S. 138 (1973).

[74] *See* 12 U.S.C. § 27 (1970).

[75] 411 U.S. at 141-43.

[76] The remainder of the paragraph dealing with section 706(2)(F) was as follows:

> The sixth category, respecting the establishment of facts upon trial de novo, would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8 or otherwise required to be reviewed exclusively on the record of a

The Committee thus apparently assumed that judicial trial de novo might be an appropriate device when the substantive validity of an agency rule turned upon the resolution of some factual claim.[77]

The *Overton Park* Court appears to have taken one of the Committee's illustrations and used it to illustrate a completely different rule. The Committee had said: "Where a court enforces or applies an administrative rule, the party to whom it is applied may for example offer evidence and show the facts upon which he bases a contention that he is not subject to the terms of the rule."[78] Because such cases normally involve facts unique to the subject of the enforcement proceeding, they do appear to fit within the Court's second category—instances "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action."[79] But the passage as a whole rebuts any notion that the

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> statutory agency hearing. It would also require the judicial determination of facts in connection with rulemaking or any other conceivable form of agency action to the extent that the facts were relevant to any pertinent issues of law presented. For example, statutes providing for "reparation orders," in which agencies determine damages and award money judgments, usually state that the money orders issued are merely prima facie evidence in the courts and the parties subject to them are permitted to introduce evidence in the court in which the enforcement action is pending. In other cases, the test is whether there has been a statutory administrative hearing of the facts which is adequate and exclusive for purposes of review. Thus, adjudications such as tax assessments not made upon a statutory administrative hearing and record may involve a trial of the facts in The Tax Court or the United States district courts. Where administrative agencies deny parties money to which they are entitled by statute or rule, the claimants may sue as for any other claim and in so doing try out the facts in the Court of Claims or United States district courts as the case may be. Where a court enforces or applies an administrative rule, the party to whom it is applied may for example offer evidence and show the facts upon which he bases a contention that he is not subject to the terms of the rule. Where for example an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued after such hearing) is invalid for some relevant reason of law, he may show the facts upon which he predicates such invalidity. In short, . . . [etc.]

SENATE COMMITTEE ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, 79th Cong., 2d Sess. 279 (1946) [hereinafter cited as LEGISLATIVE HISTORY], *quoting* H.R. REP. No. 1980, 79th Cong., 2d Sess. (1946). The paragraph alludes to the "sixth category" because it was APA section 10(e)(6) that became 5 U.S.C. § 706(2)(F) (1970).

[77] The Committee evidently assumed that the occasion for trial de novo would be an enforcement proceeding. But to the extent that modern concepts of ripeness have accelerated judicial determination of a rule's validity, one would expect that the trial contemplated by the Committee would frequently be accelerated also. *See also* text and notes at notes 218-19 *infra*.

Note that in the Committee's reference to "a rule issued without an administrative hearing," the word "hearing" must mean something more than a proceeding under section 553, for the simple reason that under the APA there is practically no rule that can be issued at all without at least a section 553 proceeding. *See* 5 U.S.C. § 553(a) (1970).

[78] LEGISLATIVE HISTORY 280.

[79] 401 U.S. at 415.

example was intended to delimit the scope of trial de novo outside the adjudicatory context. The Senate Judiciary Committee report, with a few differences in wording, is similarly broad.[80]

Earlier statutory history of the APA mentions a concrete example of how trial de novo can supply the factual predicate of rules promulgated without a hearing. The Attorney General's Committee on Administrative Procedure, appointed in 1939 to inquire into existing administrative practices and procedures, alluded in its final report[81] to *Houston v. St. Louis Independent Packing Co.*,[82] a Supreme Court case involving sausage-labeling rules of the Secretary of Agriculture. Congress had authorized the Secretary to issue rules implementing the statutory prohibition of interstate sale of meat under "any false or deceptive name." The Secretary thereupon banned the interstate sale of sausage containing more than two percent cereal, and a sausage manufacturer filed a bill in equity to challenge the decision. The district court held "an elaborate trial" to investigate the typical contents of "sausage" and the public's knowledge about the true contents of so-called "sausage."[83] Having upheld this procedure, the Supreme Court seems to have accepted, at least by implication, the principle of holding such a trial de novo in review of nonrecord rulemaking.[84]

De novo review of this sort is, of course, entirely different from the theories of "jurisdictional fact"[85] or "constitutional fact."[86] Under those doctrines, the Court has ordered judicial trial de novo, or at least a very broad scope of judicial review, over certain special issues—notwithstanding that those issues have already been resolved by the relevant agencies in adjudicatory hearings whose procedural validity the Court assumed. The theory of the House and Senate Judiciary committees differs in at least two crucial respects. First, by hypothesis the procedure they envisioned is limited to cases where the objecting party has not had an opportunity to build a trial-type record in support of his factual contentions. Second, the procedure is consistent with a narrow standard of review. Thus, assuming that "arbitrary or capricious" defines the scope of review of our hypothetical primary ambient air standard,[87] and that the EPA must therefore show only a fairly tenuous link between the disputed pollutant and the public's health, the House and Senate committees' view would support judicial trial de novo to ascertain whether even that tenuous link exists.

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[80] LEGISLATIVE HISTORY 214, *quoting* S. REP. No. 572, 79th Cong., 1st Sess. (1945).

The Attorney General's Manual argued for a narrow interpretation of section 10(e)(6), but did so only in the context of review of agency adjudications, as opposed to instances where a party draws in question the validity of a rule promulgated under section 553. ATTORNEY GENERAL'S MANUAL 109-10.

[81] ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. No. 8, 77th Cong., 1st Sess. 116 (1941).

[82] 249 U.S. 479 (1919).

[83] *Id.* at 484-85.

[84] When judicial review is to take place in the court of appeals rather than the district court, trial de novo is still possible. Sometimes, the court of appeals is authorized to transfer the case to the district court under the Administrative Orders Review Act, 28 U.S.C. § 2347 (1970). Moreover, although it is inconvenient, the court of appeals has the capacity to receive oral testimony, *see, e.g.*, NLRB v. Lambert, 250 F.2d 801 (5th Cir. 1958), or to refer the matter to a master, *see, e.g.*, NLRB v. Little Rock Furniture Mfg. Co., 123 F.2d 868 (8th Cir. 1941); NLRB v. Giannasca, 119 F.2d 756 (2d Cir. 1941). *See generally* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975).

[85] *See* Crowell v. Benson, 285 U.S. 22 (1932); Ng Fung Ho v. White, 259 U.S. 276 (1922).

[86] *See* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

Despite the apparent rarity of judicial trial de novo in these circumstances, its propriety is demonstrated by the existence of an analogous practice: judicial trial of facts that are necessary to determine the constitutional validity of statutes. Recently, for example, in *Cleveland Board of Education v. LaFleur*,[88] the Supreme Court upset school rules requiring pregnant teachers to quit in the fourth or fifth month of pregnancy. In doing so, the Court relied on evidence developed at trial below that there were "large numbers of teachers who are fully capable of continuing work for longer" than the school rules permitted.[89] On several other occasions, the Court has remanded a case to the trial court to develop a factual record sufficient for a decision on constitutional validity. In *Borden's Farm Products Co. v. Baldwin,*[90] for instance, a milk dealer challenged, on due process and equal protection grounds, a statute requiring a state milk control board, in its setting of minimum milk prices, to allow dealers without a "well-advertised trade name" a one-cent downward leeway. The Court remanded for trial to determine whether, as the state contended, the statute preserved preexisting competitive relationships.[91]

It seems that a device that can be employed (where necessary) to verify the factual underpinnings of legislation is equally appropriate for a court that wants to verify the factual support of agency rules, when the agency's factual record comes from the so-called "legislative" hearing under section 553. Neither "separation of powers" nor any other doctrine provides a distinction that would make "statutory facts"—facts needed to ascertain whether an agency's regulation is within its statutory power—any more immune to judicial resolution than facts necessary to ascertain whether a statute is within the legislature's constitutional power.[92]

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[87] *See* 5 U.S.C. § 706(2)(A) (1970).

[88] 414 U.S. 632 (1974). *See generally* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

[89] 414 U.S. at 646.

[90] 293 U.S. 194 (1934).

[91] *Id.* at 207-13. *See also* cases cited in *id.* at 211-13; Note, *The Presentation of Facts Underlying the Constitutionality of Statutes*, 49 HARV. L. REV. 631 (1936).

Do the Supreme Court opinions in *Overton Park* and *Camp* represent authoritative rejections of this viewpoint? Although the above-cited dicta certainly invite that conclusion, the holdings can clearly be reconciled with the view of the two Judiciary Committees. The mere existence of a state of facts that *would* support an administrative order is not a sufficient basis for upholding the order if there is no reason to believe the agency relied on those facts. As Justice Frankfurter observed in *Chenery I*:

> Judged, therefore, as a determination based upon judge-made rules of equity, the Commission's order cannot be upheld. Its action must be measured by what the Commission did, not by what it might have done. It is not for us to determine independently what is "detrimental to the public interest or the interest of investors or consumers" or "fair or equitable" within the meaning of §§ 7 and 11 of the Public Utility Holding Company Act of 1935. The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding. . . . There is no such finding here.[93]

In contexts such as *Overton Park* and *Camp*, therefore, where the Court has decided that the agency is not bound to state findings of fact and reasons, it may make sense to direct the lower courts to inquire first into the mental process of the administrator, since only factual support discovered there would sustain his action. Once it has been determined what his factual premises were, however, it should still be open to objecting parties to show, in a proper case, that those premises are without adequate basis in reality. At this later stage, trial de novo as contemplated by the House and Senate Judiciary committees would seem to be one of the reviewing court's options.

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[92] *Cf.* A Quaker Action Group v. Morton, 460 F.2d 854 (D.C. Cir. 1971), where the court of appeals remanded for a trial to determine whether, as against a first amendment challenge, certain Department of Interior regulations restricting the use of Lafayette Park in Washington, D.C., could be justified as essential to the protection of the President.

[93] SEC v. Chenery Corp., 318 U.S. 80, 93-94 (1943). *But see* Colorado Interstate Gas Co. v. FPC, 324 U.S. 581 (1945). *See also* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962).

But it may also be asked whether a remand to the agency instead of to a court (in other words, hybrid rulemaking) should be preferred. The most pervasive principle of administrative law—the court's duty to preserve agency autonomy to the maximum extent consistent with performing the functions of judicial review[94]—seems to call for an affirmative answer. The agency's expertise in the relevant substantive area obviously suggests the desirability of that course (although this factor may at times be offset by the agency's lack of experience in holding trial-type hearings).[95] Moreover, in the normal case it will be the agency's duty to take whatever factual conclusions emerge from testimony under cross-examination, pull them together with any other adequately supported factual findings, and transform them into a rule within the guidelines of its statutory mandate. For the court to take over a segment of the fact-finding would truncate the decision-making process.[96]

In sum, the power to conduct substantive review seems to carry with it an implied power to conduct a judicial trial de novo—and, a fortiori, a power to remand to the agency with instructions to conduct a hearing whose procedures will be adequate to assure the necessary airing of the underlying factual claims. Indeed, the de novo trial power should be sparingly exercised, because of the agency autonomy principle.

2. *Remand for Clarification.* The availability of this device is, particularly since *Chenery I,* unquestioned. The problem is whether it will afford any benefit to the challenging party. If the agency is in a position to accept the challenger's view of the facts, yet arrive at its original conclusion by articulating a new value judgment that was always within its power, a remand of this sort may moot the factual controversy. Alternatively, a remand requiring the agency to respond to detailed factual criticism may lead it to produce reports of experiments and tests that reduce to relative insignificance the critic's attacks on the perceptions relied on in the original proceed-

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[94] *Cf.* L. Jaffe, Judicial Control of Administrative Action 425 (1965) (discussing exhaustion).

[95] Note the House Judiciary Committee's unexplained assumption (*see* text at note 76 *supra*) that no agency forum would be available for formal fact-finding.

[96] *See* NBC v. United States, 319 U.S. 190, 227 (1943); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); L. Jaffe, *supra* note 94, at 425.

ing.[97] On the other hand, in some instances, such a remand may bring the factual dispute into sharper focus, but not resolve it. Then the court will still be unable to fulfill its duty of substantive review of the rule itself.

In conclusion, courts have several devices at hand for occasions when unresolved factual issues make it impossible for them to review the substance of any agency rule. The judicial trial de novo and the remand for clarification both have roles to play. But courts will sometimes find the former too intrusive and the latter too lax, and will have to consider whether hybrid rulemaking can effectively serve their needs. A look at the cases and their history on remand will provide the background for an empirical discussion of that problem.

III. THE HYBRID RULEMAKING CASES: A REVIEW OF DEVELOPMENTS

In this section, our study of the cases begins with a survey of how each defendant agency has responded to the decisions, both in the particular disputes occasioning the remand and in the agency's general methods of operation. The next sections use that data to draw inferences about the efficacy of the judicially imposed procedures, namely, (a) the qualified right of cross-examination, and (b) the right to an adequate opportunity to comprehend—and thus to reply to—the data and reasoning relied upon by the agency. Consequently, this section discusses the cases agency-by-agency, and the next sections address them procedure-by-procedure.

A. Department of Agriculture

The impact of *Walter Holm & Co. v. Hardin*[98] on the Department of Agriculture can fairly be described as modest. The Department's stance is based on a restrictive interpretation of the way that the case relates to the distinctive procedures of commodity marketing regulation; implicitly, perhaps, it is also based on a conclusion that the teachings of the case are of little general use to the Department.

The regulatory context is as follows: section 8c of the Agricultural Marketing Agreement Act of 1937[99] (the "Marketing Act") authorizes the Secretary of Agriculture to issue marketing orders governing the sale of specified commodities in order to maintain the prices received by farmers. The statute requires "due notice of an opportunity for a hearing"[100] as a condition of each order and any amendments to such orders.[101] The Department has implemented the statute's hearing requirement by issuing regulations providing for procedures that closely resemble a full adversary hearing,[102] including a right to cross-examination.[103]

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[97] *Cf.* note 192 *infra*.

[98] 449 F.2d 1009 (D.C. Cir. 1971).

[99] 7 U.S.C. § 608c (1970), *as amended*, 7 U.S.C.A. § 608c (Supp. 1974).

Pursuant to these procedures, the Secretary promulgated a marketing order for tomatoes grown in Florida (the "Tomato Marketing Order").[104] The order itself provided that the Secretary should issue so-called "regulations" to implement the order,[105] but it did not prescribe hearings for that purpose. Thus, the Secretary had established a structure which, although idiosyncratic in its nomenclature, arguably conformed to the statutory requirements: major decisions would be made after full notice and hearing, and would result in an amendment to the Tomato Marketing Order; relatively minor implementing decisions, called "regulations", would be made without a formal hearing in accordance with current data about tomato production and prices.

In 1955 the Secretary amended the Tomato Marketing Order, after notice and hearing, to authorize the issuance of regulations that would "[l]imit the handling of tomatoes by establishing, in terms of grades, sizes, or both, minimum standards of quality and maturity."[106] Then, on several occasions during 1970, he issued regulations that not only limited marketing by sizes, but also created size differentials between "vine ripe" tomatoes and "mature green" tomatoes. Specifically, the regulations gave "mature greens" a ¼-inch advantage: the sale of "vine ripes" was prohibited if they were less than or equal to 2 17/32 inches in diameter; "mature greens," on the other hand, could be sold as long as they exceeded 2 9/32 inches.[107]

Plaintiffs, importers of Mexican tomatoes to whom the restrictions were also applicable,[108] complained that the theory on which the differential was purportedly based—namely, that it would equalize the burden of the restrictions among different classes of Florida growers—was unfounded in fact; that the differential imposed a discriminatory burden upon Mexican tomatoes and had been intended to do so; and that the statute precluded such a purpose. They also alleged that in view of the vague language of the 1955 amendment and the differences in circumstances since 1955, the Secretary should have permitted a hearing on the decision to impose differential size restrictions. The court of appeals decision, written by Judge Leventhal, ordered the district court to issue a declaratory judgment that plaintiffs were entitled to hearings, with some right of cross-examination, on "crucial" issues involved in tomato marketing control. After the decision, the Department held a five-week hearing featuring extensive cross-examination, and then reaffirmed its earlier decision.[109] Parties disappointed by the decision are pressing for review of the regulation, on a wide variety of grounds.[110]

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[100] *Id.* §§ 608c(3)-(4).

[101] *Id.* § 608c(17) (1970), *as amended*, 7 U.S.C.A. § 608c(17) (Supp. 1974).

[102] 7 C.F.R. Part 900 (1975).

[103] *Id.* § 900.8(d). In practice, a witness is evidently permitted to limit his own cross-examination by refusing to answer questions he regards as irrelevant, personal, or repetitious. *See* Hamilton, *supra* note 40, at 1296.

[104] 7 C.F.R. Part 966 (1975).

[105] *Id.* § 966.50-.56 (1975).

[106] 449 F.2d at 1013-14.

[107] *Id.* at 1013.

[108] *See* 7 U.S.C. § 608e-1 (1970), *as amended*, (Supp. 1971).

It is possible to construe the opinion as simply an interpretation of section 8c of the Marketing Act. Since that statute requires "notice" and "hearing" before issuance or amendment of a marketing order, the opinion might mean that an issue such as the ¼-inch differential can only be decided as part of the issuance or amendment of a marketing order, pursuant to the "hearing" mentioned in the Marketing Act. In this view, the decision has precedential effect only for other section 8c cases. But the opinion also invites a broader interpretation. Its tone, its lack of reliance on statutory history, and its focus on the nature of the decision-making process, the risks of industry domination, and the demands of basic fairness—all suggest that the decision was intended to reach further.

These broader possibilities of the case have had no perceptible impact at the Department of Agriculture: there have evidently been no similar claims for a hearing with rights of cross-examination;[111] nor has the existence of the case prompted the Department to offer such hearings in any other instances where it previously would not have done so.[112] The Department views the case as, at most, a correction of its momentary lapse from the principle that hearings are available on issues of the sort that were at stake in *Walter Holm.*[113]

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[109] *See* 37 Fed. Reg. 17479 (1972).

[110] *See* Coast Marketing Co. v. Butz, Civ. No. 2154-72 (D.D.C. filed Oct. 27, 1972); Consumers Union v. Butz, Civ. No. 2142-72 (D.D.C. filed Oct. 26, 1972).

[111] Interview with R. Stanley Harsh, Deputy General Counsel, Department of Agriculture, in Washington, D.C., Aug. 22, 1974.

[112] *Id.*

B. Federal Power Commission

Nor have the hybrid rulemaking cases had any drastic impact upon the FPC. The two controversies in which the Commission was itself involved have not, as yet, involved *any* further agency proceedings. If the cases have had any other impact upon the Commission's behavior, the effects are subtle and apparently not onerous.

Prior to the rulemaking involved in *Mobil Oil Corp. v. FPC,*[114] the Commission, in setting rates for transportation of natural gas, had customarily allocated to liquid and liquifiable hydrocarbon rates some portion of the pipeline's total costs. The allocation was independent of what the pipelines actually charged for transportation. The purpose behind this practice was to make sure that consumers of natural gas were not burdened with those costs. In February of 1968, the Commission issued a notice of proposed rulemaking, in which it declared that it was "contemplating adopting a statement of general policy"[115] and then set forth the "general policy" in terms of suggesting a continuation of its existing practice. After a series of meetings with some of the interested parties, but without any hint that it proposed to set minimum rates for liquids and liquifiables in that very proceeding, the FPC issued an order doing just that.[116]

On review, the court first undermined one of the substantive premises of the order by holding that the Commission had no jurisdiction to set rates for liquid hydrocarbons.[117] The court then reversed the FPC order as to liquifiables, because the Commission had allowed the original proceeding "to slide over into a proceeding fixing specific mandatory rates in which the required procedures, beginning with the notice of what was to be ultimately done by the Commission, were inadequate."[118] While declining to find FPC ratemaking governed by the formal rulemaking standards of sections 556 and 557, the court concluded that the procedures of section 553 alone were insufficient. It held that, because the Natural Gas Act made "substantial evidence" a prerequisite to judicial approval of the Commission's ratemaking decisions, the Commission must permit a "testing" of its evidence "by procedures sufficiently adversary in nature to provide a reasonable guarantee of its reliability."[119] The procedures were to include either cross-examination or some effective substitute, such as written questions to be answered either in writing or orally.[120] Although the court of appeals, speaking through Judge Wilkey, relied heavily on the Natural Gas Act's requirements of substantial evidence and of a "record,"[121] some of its language—particularly that alluding to the need for a factual record that would make judicial review possible[122]—seems applicable in any rulemaking case.

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[113] *Id.*

[114] 483 F.2d 1238 (D.C. Cir. 1973).

[115] *See* 33 Fed. Reg. 2860 (1968). *See also* 483 F.2d at 1243.

[116] Order Establishing Charges for Transporting Liquids and Liquifiable Hydrocarbons, FPC Order No. 449, 37 Fed. Reg. 2954, 2957 (1972). Evidently, the justification for setting minimum prices, as opposed to merely making an accounting allocation, was that shippers of liquids and liquifiables would otherwise be able to use their market power to force the pipelines to agree to ship at lower rates; if this occurred, the FPC would have to raise transportation rates for natural gas in order to avoid impairing the financial position of the pipeline companies.

[117] 483 F.2d at 1246-49.

[118] *Id.* at 1263.

Since the decision, the FPC has, in its effort to prevent the costs of transporting liquids and liquifiables from burdening natural gas consumers, simply relied on its prior practice.[123] It has not decided whether to resume the effort to set minimum rates for liquifiables. The Commission's General Counsel and Solicitor maintain that the procedural duties imposed by the court in *Mobil Oil* are essentially irrelevant both to the Commission's hesitation and to the ultimate decision on whether or not minimum rates should be pursued.[124] Their view stems primarily from doubts that the technique the Commission employed in *Mobil Oil* was a genuine improvement over the existing practice anyway, and in part from a later decision of the District of Columbia Circuit, *American Public Gas Association v. FPC (APGA)*,[125] which in the opinion of the FPC has sharply limited *Mobil Oil*.

The second case involving the FPC, *Public Service Commission*,[126] has also failed to result in any further FPC action. The case involved area ratemaking for the Texas Gulf Area, pursuant to the Supreme Court's approval of area ratemaking in the

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[119] *Id.* at 1264.

[120] *Id.* at 1263.

[121] *Id.* at 1257-64.

[122] *Id.* at 1262.

[123] Interviews with Leo F. Forquer, General Counsel, and George W. McHenry, Jr., Solicitor, at Washington, D.C., Aug. 19, 1974.

[124] *Id.*

[125] 498 F.2d 718 (D.C. Cir. 1974). *See* text and notes at notes 142-47 *infra*.

[126] Public Serv. Comm'n v. FPC, 487 F.2d 1043 (D.C. Cir. 1973), *vacated and remanded*, 417 U.S. 964 (1974).

Permian Basin Area Rate Cases.[127] The Commission had established base rates and special provisions—"contingent escalations" and "refund work-offs"—purportedly designed to provide natural gas producers with additional incentives to explore and extract.[128] The Commission relied upon the record in another area ratemaking proceeding, *Southern Louisiana II,*[129] as a source of factual support for the special provisions.

The court of appeals unanimously held that this reliance was improper "due to the lack of opportunity given to petitioners to respond to the incorporation of that record."[130] Again speaking through Judge Leventhal, the court underlined the potential significance of this lost opportunity by pointing to a series of claims by the challengers to which the FPC had made no response.[131]

As a legal basis for its conclusion, the court alluded to the statutory requirement of substantial evidence in the record,[132] but its more fundamental premise appeared to be that the Commission had "not been responsive to petitioners' challenges to the incentive provisions of its rate order, and our judicial review function is thereby hampered."[133] The decision was placed on grounds quite independent of the issue of how the ratemaking should be classified within APA categories; it so happened that the FPC had treated the matter as "formal" rulemaking, taking over 25,000 pages of testimony.[134] Two members of the panel, Chief Judge Bazelon and Judge Richey, found the principle of the decision also applicable to the FPC's computation of base rates, saying that the Commission had failed to provide a "reasoned justification" of its solution, and had thereby made it "impossible for the parties to confront and challenge the bases for its actions."[135] They, too, stressed that a better record would be necessary if judicial review was to be more than "a formal rite of passage."[136]

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[127] 390 U.S. 747 (1968).

[128] For a discussion of the development of and statutory authority for the refund credit incentive, see Comment, *Refund Beneficiaries and Refund Credits Under the Natural Gas Act*, 41 U. Chi. L. Rev. 792, 807-13 (1974).

[129] *See* Area Rate Proceeding (Southern Louisiana Area II), 46 F.P.C. 86, *aff'd sub. nom.*, Placid Oil Co. v. FPC, 483 F.2d 880 (5th Cir. 1973), *aff'd sub. nom.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974).

[130] 487 F.2d at 1071.

[131] *Id.* at 1071-79.

[132] *Id.* at 1069.

[133] *Id.* at 1080.

[134] *See* Area Rate Proceeding (Texas Gulf Coast Area), 45 F.P.C. 674, 680 (1971).

[135] 487 F.2d at 1098.

[136] *Id.* at 1099.

Two Supreme Court decisions, and the passage of time, have rendered the case academic. In its review of the *Southern Louisiana II* rate proceeding,[137] the Court in essence approved the base rate and special incentive devices that had been at issue in the Texas Gulf decision.[138] This outcome alone would have suggested that any remand to the Commission, for the sort of procedure and articulation originally required by the court of appeals, would have had little effect. Moreover, the Supreme Court then vacated the judgment of the court of appeals in *Public Service Commission* and remanded the case to it for reconsideration in light of *Southern Louisiana II*.[139] On reconsideration, the court of appeals denied the petitions for review. It relied largely on the circumstance that developments in the natural gas industry, such as the failure of natural gas dedications to reach the level necessary to trigger the special incentive provisions, had emptied the case of virtually all practical significance.[140]

Looking beyond the *Mobil Oil* and *Public Service Commission* controversies themselves, one can find little discernible impact at the FPC. For instance, in the Commission's most gigantic recent proceeding—the setting of national rates for certain natural gas sales—some of the parties demanded more elaborate procedures, citing *Mobil Oil*, and the Commission responded:

> We believe that any question as to the adequacy of the procedures followed in this case that may have been raised by the *Mobil Oil* decision where [*sic*] laid to rest by the subsequent decision of the Supreme Court not to review the *Phillips* decision [in which the Tenth Circuit had approved the use of section 553 rulemaking for the purposes of the FPC's area ratemaking proceedings].[141] Moreover, the Court of Appeals for the District of Columbia Circuit has distinguished its holding in the *Mobil Oil* case in its holding that the Commission has the authority to establish initial rates by the use of rulemaking procedures. *American Public Gas Association, et al. v. FPC. . . .*[142]

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[137] Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974).

[138] In regard to base rates, *compare* 487 F.2d at 1097-99, *with* 417 U.S. at 315-21; in regard to contingent escalations, *compare* 487 F.2d at 1068-77, *with* 417 U.S. at 321-27; in regard to refund work-offs, *compare* 487 F.2d at 1077-79, *with* 417 U.S. at 321-27.

[139] FPC v. Public Serv. Comm'n, 417 U.S. 964 (1974).

[140] Public Serv. Comm'n v. FPC, 516 F.2d 746 (D.C. Cir. 1975).

[141] Phillips Petroleum Co. v. FPC, 475 F.2d 842 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

[142] FPC Op. No. 699, Dkt. No. R-389-B, Opinion and Order Prescribing Uniform National

The Commission went on to cite the elements in *Mobil Oil* that the *APGA* court had relied on in distinguishing that case—the FPC's inadequate notice and its reliance on rather informal conference procedures.[143]

The quoted passage does not fully convey the Commission's concern about compliance with the basic thrust of the opinions in *Mobil Oil* and *Public Service Commission.* At other points in its national ratemaking opinion, the FPC stressed that its procedure permitted a meaningful dialogue between the parties and the Commission,[144] and that none of the parties claiming a right to cross-examine had identified any issues requiring cross.[145]

The FPC's broader objectives may explain its long-run reaction to the two decisions. It has only recently embarked on the drastic step of abandoning its tedious procedures for ratemaking by means of formal rulemaking, in favor of section 553 procedures. The step received judicial sanction in *Phillips* and *APGA*, but in both cases the Commission's victory fell short of a *carte blanche.* In *Phillips,* the ratemaking had not yet taken place, and the court noted its power "to remand the cause to the agency for further delineation, information, or expression of views."[146] In *APGA*, the court stressed that the Commission had provided all parties with an opportunity to criticize and analyze all the data and submissions on which it had relied; the court also emphasized the protesting parties' failure to identify any issues that could be explored more successfully by cross-examination than by the procedure actually employed.[147] Thus, it is hardly surprising that the Commission has been able to take *Public Service Commission* and *Mobil Oil* in its stride. Providing parties advance access to its data and theories is a far less burdensome alternative than the procedures from whose tangles it appears to be escaping—including the virtually automatic right of all parties to engage in cross-examination.

Rate for Sales of Natural Gas Produced from Wells Commenced on or After January 1, 1973, and New Dedications of Natural Gas to Interstate Commerce on or After January 1, 1973, at 11 (June 21, 1974).

[143] *Id.*; *see* APGA, 498 F.2d at 723.

[144] ". . . [E]very party has been given an opportunity to submit two sets of responses and replies to the responses of all other parties. Thus, no party can be heard to complain that he lacked an adequate opportunity to develop his case before the Commission." FPC Op. No. 699, *supra* note 142, at 14.

[145] "No party has pointed out any specific questions or issues that it would raise upon oral cross examination or why it could not adequately 'test, criticize, and illuminate the flaws in the evidentiary basis being advanced regarding a particular point' by other parties in its own written submissions. (See *Mobil Oil Corp. v. FPC*, . . .)." *Id.* at 12.

[146] 475 F.2d at 850.

[147] 498 F.2d at 723.

C. Environmental Protection Agency

Of the agencies examined here, the EPA has made the most self-conscious effort to apply in new contexts the lessons of the hybrid rulemaking cases to which it has been a party: *International Harvester*,[148] *Appalachian Power*,[149] and *Portland Cement*.[150] Its reactions are discussed in detail in the next section of this article. This section is limited to a resume of the EPA cases and their post-remand history, together with a brief listing of the techniques adopted by the EPA in its effort at compliance.

In *International Harvester*, the EPA had denied the auto companies' applications, under the Clean Air Act of 1970, for one-year deferrals of the effective date of 1975 emissions standards.[151] In remanding, the court of appeals imposed upon the EPA two procedural requirements: to permit "some opportunity for cross-examination," which the agency could confine "to the essentials, avoiding discursive or repetitive questioning";[152] and to provide the parties an "opportunity on remand to address themselves to matters not previously put before them by EPA for comment, including material contained in the Technical Appendix filed by the EPA in 1972 subsequent to its [original] Decision."[153]

Again Judge Leventhal's opinion alluded to a statutory basis—here, the Clean Air Act's requirement of a "public hearing."[154] But he invoked that requirement only in passing as a basis for the limited right of cross-examination and not at all as a basis for the broader right to see and challenge the critical steps of the EPA reasoning process. Against a background suggesting that the social costs of an erroneous refusal to suspend might be calamitous,[155] and the court's clear feeling that the automobile companies had raised substantial doubts about the validity of the EPA's factual predictions,[156] the court clearly put primary emphasis on its inability to afford meaningful review if either right were denied.[157]

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[148] International Harvester Corp. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

[149] Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973).

[150] Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[151] *See* 42 U.S.C. § 1857f-1(b) (5) (1970). Since the statute seemingly permitted reapplication after denial, there might have been a second hearing even in the absence of a remand. One might even speculate that the EPA was putting maximum feasible pressure on the auto companies by denying the first application while anticipating that it might later reverse itself.

[152] 478 F.2d at 649. *See also id.* at 630-31.

[153] *Id.* at 649.

[154] *Id.* at 629-31.

[155] *Id.* at 636-38, 641.

[156] *Id.* at 642-47.

On remand, the agency substantially modified its decision, making it in many respects more lenient to the auto manufacturers.[158] So far as cross-examination was concerned, the mandate of the court proved a shaggy dog story. Chrysler, which had vociferously insisted on the need to cross-examine, never once requested an opportunity to do so. And although Ford requested an opportuntiy to cross-examine the EPA staff members who had devised the methodology for the remand,[159] it accepted the EPA's alternative offer of an off-the-record conference with those staff members. The EPA also furnished the auto companies with a fairly elaborate advance written statement of its proposed methodology.

The decision of the Fourth Circuit in *Appalachian Power*—the only one of these decisions rendered by a court other than the District of Columbia Circuit—involved similar procedural commands. At issue was the EPA's approval, under section 110 of the Clean Air Act,[160] of "state implementation plans" for bringing ambient air pollution levels down to those prescribed by the Administrator under section 109 of the Act.[161] Since the statute required each state to hold a hearing before adopting a plan,[162] the court of appeals held that an EPA hearing could be dispensed with if, but only if, the state hearing had been "adequate."[163] The court's concept of adequacy was expressed rather vaguely:

> What is required in all instances, whatever the character of the administrative action, is "the reality of an opportunity to submit an effective presentation," and, if in the context of the issues involved, "cross-examination on the crucial issues" is found proper, such right should be recognized and upheld. Walter Holm & Company v. Hardin . . . .[164]

Again, one may summarize the case as requiring both a contingent right of cross-examination (though what it is contingent upon is obscure), and some opportunity for an effective challenge to the EPA's approach. To reach that result the Fourth Circuit relied neither on APA classifications nor the substantive statute, but upon the necessities of judicial review.[165] The court additionally alluded to due process considerations,[166] but did not reveal just how the constitutional argument would run.

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[157] *Id.* at 632, 649.

[158] 38 Fed. Reg. 10317 (1973).

[159] Hearings on Applications for One-Year Suspension of the 1975 Motor Vehicle Emissions Standards 2182-86 [hereinafter cited as Emissions Suspension Remand Hearings].

[160] 42 U.S.C. § 1857c-5 (1970).

[161] *Id.* § 1857c-4.

[162] *Id.* § 1857c-5(a)(1).

[163] 477 F.2d at 502.

[164] *Id.* at 503.

As was true in *International Harvester*, the contingent right to cross-examination was not exercised. Although the state hearings had not involved opportunity to cross-examine,[167] the litigation concerning the implementation plans of West Virginia and Maryland[168] was resolved by agreements under which the companies abandoned any claim to cross-examination. Instead the parties agreed that EPA would furnish a written response to each of the critiques made by the companies, to be followed by an opportunity for the companies to respond to the EPA response; and the companies would retain an option to call an off-the-record or on-the-record technical conference with the EPA.[169]

The mandate in *Portland Cement* is, of all the hybrid rulemaking cases the least detailed in its procedural prescription. Indeed, the court articulated its procedural demands as a functional appendage to its analysis of the challenger's substantive attacks on the agency's rule, which imposed air pollution performance standards on newly constructed Portland cement plants. After a discussion devoted principally to the challenger's factual contentions, the court declared: "This record reveals a lack of an adequate opportunity of the manufacturers to comment on the proposed standards, due to the absence of disclosure of the detailed findings and procedures of the tests."[170]

Again speaking through Judge Leventhal, the court of appeals pointed to nothing in the substantive statute that might trigger any particular procedures. Instead, the court invoked section 553 in a footnote: "Written comments were submitted as requested, and as required by the APA § 4(c), 5 U.S.C. § 553(c). Obviously a prerequisite to the ability to make meaningful comment is to know the basis upon which the rule is proposed."[171] In the body of the opinion, moreover, the court justified the remand by relying upon the need for an adequate factual record that would enable it to discern whether, in the language of *Citizens to Preserve Overton Park, Inc. v. Volpe*,[172] " 'the decision was based upon a consideration of the relevant factors and whether there has been a clear error of judgment.' "[173]

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[165] *Id.* at 503-07. The court explicitly assumed that the scope of review was whether EPA's action had been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 506-07, *quoting* APA § 10, 5 U.S.C. § 706(2)(A) (1970).

[166] 477 F.2d at 503.

[167] Interview with Theodore L. Garrett, an associate at Covington & Burling (Washington, D.C.), which is counsel for petitioners Appalachian Power Co., Duquesne Light Co. and Ohio Power Co., at Washington, D.C., Aug. 20, 1974.

[168] The other dispute in the case—concerning Virginia's implementation plan—was resolved without the adoption of any formal procedure for exploration of factual contentions. Telephone interview with Neil T. Proto, attorney, Department of Justice, July 9, 1974.

[169] *See* stipulation dated June 20, 1974, in Appalachian Power Co. v. EPA, No. 72-1733 (4th Cir.); stipulation dated March 29, 1974, in Bethlehem Steel Co. v. EPA, No. 72-1776 (4th Cir.).

[170] 486 F.2d at 402. *See also id.* at 392-95, 393 n.67 (reflecting failure of prior, unreported remand to cure problem of insufficient detail).

The remand is complete, and the original rule, only slightly modified, has been affirmed on appeal.[174] The EPA produced a 58-page draft response, articulating its methodology and endeavoring to respond to critiques of the manufacturers that the court had deemed worthy of answer. Voluminous further critiques and a final EPA response followed. Although the challenger appealed, its brief did not launch any serious attack on the technical conclusions that had been the occasion of the remand.[175]

IV. The Utility of Cross-Examination

Admittedly, it is impossible to discover exactly how much the various procedural devices ordered in the hybrid rulemaking cases have contributed to the elucidation of relevant issues. Even when new light dawns during cross-examination, for example, one can rarely say with confidence that some other procedure would not have shed equivalent light. The converse is also true: if examination fails to expose any material falsehood or inaccuracy, the reason may be that *fear* of cross-examination has inhibited a falsehood, has inspired exceptional caution, or has led to the witness's revealing on direct what might have been elicited on cross. In the language of social science, there is no "control group": no identical agency working on the same issue and following all the same procedures except the one whose value is being tested.

Nonetheless, our limited sampling is in some respects suggestive. Of the four cases in which some possibility of cross-examination seemed to be required (*Walter Holm, International Harvester, Appalachian Power,* and *Mobil Oil*), *Walter Holm* is the only one in which it has actually occurred. Some indication of the role of cross-examination emerges from the challengers' brief and proposed findings of fact in that dispute, wherein they rely upon material brought out by cross-examination of witnesses who supported the proposed rule.

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[171] *Id.* at 393 n.67.

[172] 401 U.S. 402, 416 (1971).

[173] 486 F.2d at 402.

[174] Portland Cement Ass'n v. Train, 513 F.2d 506 (D.C. Cir. 1975).

[175] Brief of Petitioner Following Remand, D.C. Cir. No. 72-1073. The EPA staff counsel in charge of the matter believes that the remand not only produced a record that sufficiently supported the agency's rule, but also had (in conjunction with the other hybrid rulemaking cases) the long-term effect of inducing the EPA to base its rules on more adequate data. Telephone interview with Richard Denny, May 28, 1975.

A. Cross-Examination and Methodological Disputes

By all odds the most dramatic instance of cross-examination cited by the challengers in *Walter Holm* was Louis F. Rauth's, a witness for the proponents of the ¼-inch differential. A key theory in support of the differential was that "vine ripe" tomatoes at the time of picking are approximately ¼-inch larger in diameter than "mature greens" at the time of picking. Rauth testified to field measurements of tomatoes which, he said, verified the differential. He spoke vaguely of making the measurements with his thumb and finger.[176] During cross-examination the witness revealed that he had simply *looked* at the distance between his thumb and finger as they grasped the tomato, first when it was a mature green, and then, a week or so later, when he had returned to grasp the same tomato. In other words, he had used no instrument for measuring but his eyeball, and no method for recording the first measurement. Yet he claimed to have measured a ¼-inch growth.[177]

Had Rauth's "measurements" been the sole support for the alleged ¼-inch differential, his cross-examination would presumably have demolished the proponents' case. One could fairly say that his testimony carried "its own death wound."[178] In fact, however, there was also substantial evidence of the more conventional statistical type, and material elicited on cross-examination had only a slight tendency to diminish the strength of that data.

The statistical evidence fell into two categories: formal reports of scientific sampling by agricultural experts, and records of the sizes of tomatoes actually shipped from Florida. Of the scientific reports, one, made in 1920,[179] indicated that Florida tomatoes displayed no growth in size worth mentioning in the last two weeks before becoming "vine ripe." In the week immediately preceeding that two week period, however, the tomatoes tested had shown an average growth of nine millimeters in diameter, well over a quarter of an inch.[180] Thus, the issue of whether the 1920 report sustains or undermines the ¼-inch differential turns on the issue of how long before becoming "vine ripe" (a status shown by even a slight "blush" of pink on a tomato) mature green tomatoes are actually picked. If, but only if, such tomatoes are characteristically picked about three full weeks or longer before the "vine ripe" stage, the report tends to prove that the ¼-inch regulatory differential reflects a ¼-inch real-world differential.

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[176] Hearings With Respect to Proposed Amendment of Marketing Agreement and Order [hereinafter cited as Tomato Remand Hearings] at 217-18.

[177] *Id.* at 1654-55. Ironically enough, the pivotal questions were put by a representative of the Department of Agriculture.

[178] *See* NLRB v. Pittsburgh S.S. Co., 337 U.S. 656, 660 (1949).

[179] Tomato Remand Hearings, Exh. 30.

The evidence on harvesting times relied on by the opponents of the rule consisted in part of statements by their own witnesses, but also included testimony by Florida growers who supported the differential.[181] A concession from opposing witnesses certainly cuts more ice than the claims of one's own, so those concessions cannot be dismissed as mere duplications of the challengers' own direct evidence. Two circumstances suggest, however, that only limited value can be assigned to the challengers' having had a chance to cross-examine. First, the final decision was rendered by a Department of Agriculture official who was not physically present at the hearings; consequently, the concessions had no dramatic value so far as the ultimate decision making was concerned. Second, there seems no particular reason to suppose that well-drafted interrogatories (had they been permitted) would not have achieved as much.

The inferences drawn from the 1944 study are largely independent of any right of cross-examination. Although its methodology was not clear, it found an increase in the last four days before "vine ripe" status from 178.1 cubic centimeters to 193.4 cubic centimeters, or 8.59%.[182] Well established principles of mathematics permit one to convert a change in the volume of a sphere into the corresponding change in its diameter.[183] Cross-examination was hardly necessary, therefore, to show which side the 1944 report helped. Nor does it seem probable that cross-examination of those who prepared the 1944 study would have shed much light on the adequacy of its methodology.

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[180] *Id.*

[181] *See id.* at 47, 51, 1553, 2269, 3458.

[182] Although Exhibit 31, the 1944 report on tomatoes in Mississippi, speaks of measurements in *cubic* centimeters, the Department of Agriculture decision suggests that they may have been measurements of diameters. *See* 37 Fed. Reg. at 17482. How this could be so is not immediately apparent.

[183] $V = 4/3\ R^3$ (where V is volume and R is radius). Thus, an 8.59% increase in volume equals a 2.8% increase in diameter; applied to a tomato of 2 9/32 inches in diameter, it would mean an increase of about 2/32, or only ¼ of ¼ of an inch. The mathematical implications of a given increase in volume, for purposes of ascertaining changes in diameter, are omitted from the Department of Agriculture decision. *See id.*

In terms of *identifying* methodological errors, it would seem that the report's own omissions and revelations would provide a record to which cross-examination could add relatively little, because detailed articulation of methodology is presumably a prerequisite to scholarly acceptability. And in terms of *determining the weight* to be attached to methodological errors, although again concessions from the study's own creators would perhaps be ideal, interrogatories to the agency might achieve substantially similar impact.[184]

Further statistical evidence took the form of shipping data, especially for mid-January through April 1971. Data relied on by the Department showed that, as applied to vine ripes and mature greens shipped in that period, a 5/32-inch differential would have resulted in equality of withholding over that period.[185] And once again, the challengers' attack on the Department's inferences drew little support from the fruits of cross-examination: (1) they maintained that the real issue was an 8/32-inch differential, the one recommended by the Florida Tomato Committee[186] and adopted by the Secretary;[187] (2) they argued that equality of withholding between a "vine ripe" segment and a "mature green" segment of the Florida industry was probably not the true purpose of the proposed differential, because intentional production of vine ripes was trivial in Florida;[188] and (3) they pointed to statistics suggesting the discriminatory impact on Mexican producers, and argued that the real—and illegal—motive was to achieve that impact.[189] On matters of industry practices, particularly in connection with the second argument, concessions from Florida growers who favored the differential were somewhat useful. But again, it is not clear that live testimony subject to cross-examination was much more useful than, say, interrogatories to the Department would have been (perhaps supplemented by affidavits of the challengers' own allies).

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[184] *Cf.* Robinson, *supra* note 24, at 522-23. Professor Robinson's argument that cross-examination forces "the agency to explain and articulate the assumptions and the foundations on which its policy rests" is true as far as it goes; but he suggests no reason to believe that (so far as most issues in most rulemaking proceedings are concerned) the same goal cannot be achieved as well by less time-consuming methods.

[185] *See* 37 Fed. Reg. at 17483.

[186] The Committee is comprised of Florida tomato growers appointed by the Secretary after nominations from the industry. It performs a variety of implementation functions under the Order. *See* 7 C.F.R. §§ 966.22-.35 (1975).

[187] Brief of West Mexican Vegetable Distributors Association, December 23, 1971 (Department of Agriculture Dkt. No. A0-265-A3) at 53-57.

[188] *Id.* at 49-52.

[189] *Id.* at 19-26.

Taking the tomato dispute as a whole, then, it seems doubtful that the use of cross-examination was necessary to clarify either of the critical issues—the actual difference in size between "vine ripes" and "mature greens" at the times tomatoes are harvested, and the actual economic impact of the size restrictions. It is interesting that cross-examination scored its most dramatic hit when used to test an individual human being's visual measurements of tomato sizes. The Rauth testimony was fairly destroyed, so much so that one can hardly imagine an agency relying on his measurements in the slightest degree.[190] This observation tends to corroborate the assumption, commonly asserted in support of the hearsay exclusion, that cross-examination is valuable for challenging a declarant's perception.[191] But the hit scored on cross-examination became rather like the proverbial punch into a bag of sand or grain; the mass reshaped itself, and little was changed. The case had been buttressed by enormous quantities of additional data —most of it ultimately resting on sense perceptions that could never have been subjected to cross-examination. In perspective, the one demolished sense perception proved to be of little importance.[192]

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[190] The Department's final decision can be read to suggest that it did put some small stock in the testimony. *See* 37 Fed. Reg. at 17482.

[191] *See, e.g.*, Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 188 (1948).

[192] Interestingly, a similar situation developed in the *Portland Cement* case, on an issue concerning which the court did not require cross-examination on remand. Ralph Striker, an engineer who specialized in kiln design, submitted an analysis of the EPA's test at the Dragon Cement Company's plant in Northhampton, Pennsylvania. By comparing the amount of CO_2 going into the plant with the amount of CO_2 the EPA had measured in the stack gases emitted, he was able to show that the figures relied on by the EPA violated the laws of chemistry. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 397-98 (D.C. Cir. 1973); EPA Draft Response at 48-50 (Nov. 26, 1973); EPA Final Response, Appendix I at 12-14 (Nov. 1974). In its Draft Response on remand, the EPA conceded that a measurement error must indeed have been made, but argued that it must have been made in the measurement of particular chemicals in the stack gas (which would not undermine the test results), rather than, as Striker assumed, in the measurement of the stack gas flow rate. The argument is complex; happily, its merits are irrelevant to our inquiry. Even if Striker's contention had been accepted in full, it would have altered the data of only one test out of three at the Dragon Cement plant. The average test results from the Dragon plant would still have been well below the standard promulgated by the EPA. Moreover, the Dragon plant had been only one of six facilities tested. EPA Draft Response at 9-15, 48; EPA Final Response at 11-17, and Appendix I, at 12. It is hard to see how cross-examination of, say, the sloppy measurer could significantly alter the outcome.

The analysis presented here should not necessarily be limited to rulemaking. It would seem equally applicable to any "polycentric" problem—one in which many factors are rele-

B. Cross-Examination and Agency State of Mind

The remand in *Walter Holm* also raised issues concerning the state of mind of members of the Florida Tomato Committee.[193] The challengers contended that the Committee's purpose was to devise a regulation that would protect the Florida tomato industry from Mexican competition. Since the statute did not authorize that purpose, the Secretary's action in imposing the regulation might well have been struck down if an anti-import purpose had been found to have tainted his consideration.[194] Since all parties apparently assumed that the circumstances presented an exception to the rule of *Morgan IV*[195] (which proscribes interrogation of administrators about their mental processes), the challengers vigorously cross-examined members of the Committee concerning their purposes. It so happened, however, that the challengers were in possession of the transcripts of tapes of the Committee's meetings. In view of the Committee members' fairly express proclamations on the tapes that they intended to protect Florida growers from Mexican competition, cross-examination could add little. The challengers were able to confront the Florida Tomato Committee manager and some of its members with statistical data that tended to draw in question their purported intention of "equalizing the burden,"[196] and to rub their noses in the transcripts,[197] but little more.

Granted, the presence of the tapes in *Walter Holm* was a happy fortuity. It seems quite probable that other instances will arise where *Morgan IV*'s bar is lifted and where no such excellent substitute for cross-examination exists. But it should not be expected that circumstances of this kind are likely to result in a flowering of hybrid rulemaking. Normally, one supposes, it would be the court, rather than the agency itself, that would conduct such an inquiry. *Walter Holm* is probably an anomaly insofar as it involved an agency conducting an inquiry into the state of mind of its own

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vant, their relationship and respective weighting is unresolved, and the amount of data supporting each factor is substantial. Licensing proceedings, for example, although classified as "adjudication," *see* 5 U.S.C. § 551(6)-(7) (1970), would seem prone to the same difficulty.

[193] On the nature of the Committee, *see* note 186 *supra*.

[194] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("To make this finding [that the Secretary's decision was not arbitrary, capricious or an abuse of discretion] the court must consider whether the decision was based on a consideration of the relevant factors . . . ."); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 318-19 (1933). *See also* Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 209-17.

[195] United States v. Morgan, 313 U.S. 409 (1941).

[196] *See, e.g.*, Tomato Remand Hearings at 2994-3062.

[197] *See, e.g., id.* at 1597-99.

appendage, the Florida Tomato Committee, in order to resolve the issue of whether its own decision making was tainted by defects in that appendage's state of mind. Customarily, by contrast, the need for inquiry into agency members' states of mind will not involve a court imposing procedures upon an agency, but simply a court employing its own traditional procedures directly.

Furthermore, insofar as there is a place for cross-examination at the agency in this regard, the rationale for it provides little basis for a more general expansion in hybrid rulemaking. The issue of the state of mind of agency members is quite different from the usual sort of fact issue in rulemaking. It does not involve extrapolation of data into the future, to determine whether the proposed rule will, as applied to real-world facts, have effects in accord with the agency's legislatively declared mandate. The concern is not in submitting data to rigorous analysis; it is in seeing how a few individuals will react when confronted with evidence that their public stance has been a facade. Thus, when agency state of mind is at issue, there is no thought that the agency members may save the rule by asserting a legislatively authorized value judgment; the whole problem is that they may have relied upon legislatively unauthorized values. In short, the circumstances that we previously identified as the peculiar characteristics of fact-finding for purposes of rule declaring are absent here.[198]

The *Walter Holm* setting should be distinguished from circumstances in which states of mind arise as a conventional issue within rulemaking.[199] For instance, whenever a rule is to be promulgated because of its asserted deterrence value, it will be relevant to inquire whether the proposed rule will in fact have the desired effect on the behavior of those sought to be deterred. One may want to survey, for instance, the extent to which they are aware of existing penalties.[200] But cross-examination of the people who are the subjects of the inquiry seems inherently infeasible, because it would consume extraordinary amounts of time and probably would add little to the survey itself.[201]

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[198] *See* text and notes at notes 21-25 *supra*.

[199] In *International Harvester* there was a substantive state-of-mind issue, namely, whether Chrysler had shown compliance with the statutory prerequisite of making "good faith" efforts to meet the standards. 42 U.S.C. § 1857f-1(b) (5)(C)(ii) (1970). EPA panel members vigorously cross-examined Chrysler executives on the point. On this issue, it would seem that the proceeding was indeed adjudicatory, because Chrysler's entitlement to a one-year suspension turned upon its own good faith.

[200] *See, e.g.*, F. Zimring & G. Hawkins, Deterrence 145-47 (1973).

[201] *Cf.* Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 684 (S.D. N.Y. 1963). *But cf.* Wirtz v. Baldor Electric Co., 337 F.2d 518 (D.C. Cir. 1963) (persons who had filled in

C. Putting Cross-Examination into Perspective

While the *Walter Holm* case simply fails to show that cross-examination is an effective investigative procedure in the rulemaking context, or even to suggest areas where imposing it upon an agency is likely to be efficient, the other hybrid rulemaking cases provide an even more telling indication of its value: they display parties trading away the right to cross-examination, or abandoning it without any offsetting benefit. In *Appalachian Power*, the challenging companies accepted a procedure that excluded cross-examination, and obtained, principally, a deferral of proceedings against them until completion of the EPA's review of the challenged state implementation plans. And in *International Harvester*, Chrysler thought it not worthwhile to exercise the right that it had so vociferously sought.[202]

In view of this circumstance, it should not be overlooked that a successful claim of a right to cross-examination offers challengers to a rule certain advantages that are independent of whatever elucidation it might furnish: First, and most obviously, cross-examination presents an opportunity for delay (except in the probably rare case when a court remands for a hearing involving cross-examination but leaves the rules in effect pending the hearing[203]). Second, possession of a right to cross-examination gives challengers a bargaining tool; by offering to waive the right, the challenger may be able to bargain for almost any benefit that the agency can bestow, including, presumably, a relaxation of the substantive standard. Third, the challengers' possession of a right to cross-examination may subtly exert pressure on the agency to take a milder stand, quite apart from explicit bargaining about relinquishment of the right. The milder the proposed rule, the more likely that the agency can completely escape the investment of resources that rulemaking through cross-examination techniques involves. Perhaps more important, the agency may be tempted to adopt the viewpoint of the challengers and thereby eliminate issues that would provoke extended cross-examination. Fourth, challengers may, by their treatment of witnesses, chill the readiness of scientists

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a Bureau of Labor Statistics questionaire stated in affidavits that they had understood the questionaire to mean something different from what the Bureau was trying to derive from it). As for cross-examination of those who conducted the survey, an agency engaged in rulemaking would be interested not in their state of mind, but in their methodology.

[202] *Mobil Oil* is excluded from consideration because the matter has been wholly in limbo since the appellate court's decision. *See* text and notes at 123-25 *supra*.

[203] *Cf*. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

to work for a regulatory agency. Rudeness and badgering, pedantry and sophistry will ultimately take their toll.[204] Fifth, cross-examination of an unseasoned expert may score debating points whose value is more apparent than real. If, for example, a scientist has conducted an experiment and has omitted a particular precaution because of a reasonable judgment that the value of the precaution in assuring accuracy was outweighed by the effort necessary to employ it, the challenger may be able to make him appear as a knave or a fool. (One consolation, however, is that participation in research for rulemaking may ultimately breed a strain of scientists immune to this sort of cross-examination.)[205]

Apart from the leverage it gives challenging parties, cross-examination may actually tend to frustrate its own supposed goal: elucidation of the issues. Cross-examination virtually assures that high-level agency decision makers will not participate, for they do not have enough time for that sort of enterprise. For example, the hearing in *Walter Holm* took place before a "hearing examiner" without the power even to issue a recommended decision. By contrast, the inquiry conferences employed by the EPA in its emissions suspension case, and on the issue of flue-gas desulphurization,[206] included substantial participation by the Administrator or his highest ranking assistants.

It may be that in other rulemaking contexts cross-examination would play a vital role in elucidating relevant issues. Certainly the cases described here represent too small a sample to establish the contrary proposition. Moreover, this sample may be biased by the presence of so many cases involving fact issues in the natural sciences or engineering. In such cases the crucial issues seem usually to be ones of methodology, and the history of scientific progress would suggest that cross-examination is not particularly efficient for resolving issues of that kind. Admittedly, the participants in traditional scientific controversy have stronger claims to being treated as impartial than the experts involved in most rulemaking. The former are usually not on the payroll of an organization with a large pecuniary or ideological stake in the outcome. Nevertheless, the struggle of scientists for the acceptance of their ideas, or for clarifications of accepted ideas, whether in the ivory tower or the context of decision making, seems to have advanced through relatively informal procedures.[207]

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[204] *Cf.* Hamilton, *supra* note 40, at 1290.

[205] Notwithstanding this list of factors, which are largely negative from an agency's point of view, it should be noted that on occasion agencies have more or less voluntarily tendered challengers an opportunity to engage in cross-examination. *See* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 471 n.9, 472 n.12 (D.C. Cir. 1974). Hindsight showed that the agency had had little to fear: "[t]he questions actually asked tended to be few, sporadic, and perfunctory. . . ." *Id.* at 471 n.9.

[206] *See* text and notes at notes 237-46 *infra* (on inquiry conferences).

D. Judicial Choices Concerning Cross-Examination

1. *Is it needed?* The arguments advanced in this section of the article suggest certain conclusions about when a court should impose hybrid rulemaking through cross-examination and how it should be done. Given the questionable efficacy of cross-examination in the cases that have been surveyed, it would seem that courts should impose it only when the challenger has discharged the burden of doing at least the following:

First, he must identify with particularity the issues requiring cross-examination.[208] Only then can the court competently evaluate the claim. If the agency's record in the proceeding is too opaque for the court justly to put this burden on the challenger, a remand for purposes of clarifying the record may be in order.

Second, he must demonstrate the substantiality of the issues to be resolved by cross-examination. If resolution of them in accordance with the challenger's factual contentions would only trivially alter the data base for the agency decision, cross-examination would clearly be a waste.[209]

Third, he must demonstrate that less onerous procedures will probably not be able to resolve the issue with sufficient accuracy. For example, if sense perceptions are at stake,[210] and were made by persons not under the control of the challenger[211] (or of a party with an interest identical to that of the challenger), the challenger can be said to have made out his prima facie case on this score.

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[207] The reasons advanced by Wigmore for the qualified exception to the hearsay rule for learned treatises seem relevant to reliance on uncross-examined evidence in this context: (1) necessity, because of the extraordinary inconvenience that would follow from throwing out all expert testimony not based exclusively on personal observation, and (2) trustworthiness, derived largely from the authors' interests in preserving and enhancing their reputations within the scientific fraternity. *See* VI WIGMORE ON EVIDENCE §§ 1691-92 (3d ed. 1940).

As Judge Leventhal notes, dissenting in Cooper Labs., Inc. v. Comm'r, 501 F.2d 772, 793 (D.C. Cir. 1974),

> . . . [A] particular case may involve the kind of issue that calls for an oral argument rather than an evidentiary hearing or for a legislative rather than an adjudicative hearing. These comments are highly pertinent when what is at issue are technical questions of methodology. Indeed, in such a case the reality of technical dialogue and interchange of view can perhaps best be provided by an on the record conference-hearing procedure, modeled on conference discussions between lawyers and experts. . . .

[208] For instance, there would have to be far more particularity than Chrysler's vague goal of cross-examining catalyst manufacturers in the emissions suspension case. *See* note 211 *infra*.

[209] *See* text and notes at note 192 *supra*.

[210] *See* text and notes at notes 176-78, 191 *supra*.

2. *Procedural Issues.* Once the claim of a need for cross-examination has been favorably resolved, the court must face the issue of the proper forum: court or agency. As argued above,[212] the principle of agency autonomy suggests a presumption in favor of remand to the agency. In some cases, Congress itself seems to have pointed the courts in precisely that direction.[213] Other circumstances may point powerfully in the other direction. Sometimes, for example, the well-known exhortation not to put the fox in charge of the chicken coop may apply. If the challengers have made a showing sufficiently powerful to persuade a court that *Morgan IV*'s

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[211] The *International Harvester* case points up the problem of identifying the parties with the best access to the underlying sense perceptions. In that case, it will be recalled, Chrysler made a passionate plea for the right to cross-examination, won it, and never used it. In the course of its plea, Chrysler had argued that the issue turned on the efficacy of catalysts, and that accurate resolution of the issue required that the auto manufacturers have an opportunity to cross-examine executives of the catalyst manufacturers. The difficulty with the argument was that in practice it was the auto companies who had best access to the relevant sense perceptions, since it was their employees who had done the testing. There had been some testing by Englehard Industries, but it had been relatively exceptional. *See* Emissions Suspension Remand Hearings at 915. *See also id.* at 969-70. In view of the auto companies' control over those who had conducted the testing and who therefore had made the relevant sense perceptions and transformed them into statistics, it is not surprising that, on this point at least, the auto companies backed away from their interest in cross-examination.

[212] *See* text and note at note 96 *supra*.

[213] For example, section 19 of the Natural Gas Act provides that on review of FPC orders under the Act:

> If any party shall apply to the courts for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. . . .

15 U.S.C. § 717r(b) (1970). *See also* Consumer Product Safety Act § 11(b), 15 U.S.C. § 2060(b) (1972).

Language in the Administrative Orders Review Act, 28 U.S.C. § 2347(b) (1970), might seem to point the other way for remands of orders under its coverage (including certain final orders of the Federal Communications Commission, the Secretary of Agriculture, the Federal Maritime Commission, the Maritime Administration, and the Atomic Energy Commission). It provides that when an agency "has not held a hearing," and when, further, "a hearing is not required by law and a genuine issue of material fact is presented," the court "shall . . . transfer the proceedings to a district court. . . ." However, in view of the Supreme Court's decision in United States v. Florida E.C. Ry., 410 U.S. 224 (1973), treating a section 553 rulemaking as a "hearing" within the meaning of the Esch Act (*see id.* at 240), it would seem that a section 553 rulemaking cannot be regarded as one in which no "hearing" is required by law. On this interpretation, section 2347(b) is inapplicable and, if the Administrative Orders Review Act is relevant at all, section 2347(c), which contemplates remand to the agency for taking of additional evidence, would be the relevant provision.

bar against inquiry into the agency's thought process should be lifted, it would ordinarily seem preferable that trial of the matter should proceed before a court rather than the agency.[214]

In a case in which trial de novo in court is more appropriate, there may be difficulties in locating a court. If the controlling statute provides for review in a court of appeals, but does not authorize transfer to a district court for resolution of factual issues,[215] no clear route to a district court is evident.[216] Section 703 of the APA provides for review in *any* court of competent jurisdiction in the event of "inadequacy" of the statutorily prescribed form of review; that condition is arguably present when there remains a factual issue whose resolution is essential for responsible substantive review, yet remand to the agency is inappropriate. Moreover, section 704 provides that "final agency action for which there is no adequate remedy in a court" is "subject to judicial review." In these circumstances, a challenger might be well advised to commence review proceedings at both levels—the statutorily prescribed petition to the court of appeals and a claim in the district court under the sections just mentioned.[217] If the challenger fails to initiate a district court action, the present statutes do not readily suggest a way for the court of appeals to bring in the district court's adjudicatory skills.

Delicate problems of timing may arise as well. Because of recent relaxations of ripeness requirements, courts often engage in judicial review of rules prior to agency enforcement. But there may be a temptation to say, as the Sixth Circuit did in *Buckeye Power, Inc. v. EPA,*[218] that any factual issues relating to the validity of the regulation should be deferred until the time of enforcement proceedings if the issues demand adjudicatory techniques. The conclusion seems too facile. The justification for easing ripeness requirements has been increased concern about the impact of the regulation upon the conduct of affected industries prior to the moment of any enforcement proceedings[219] (and, perhaps, lessened concern that a court should not speak to an issue until the imminence of civil or criminal penalties makes judicial review—if it is ever to occur—an immediate necessity). But the impact upon industry conduct is not limited or qualified merely because the validity of the regulation turns upon as yet unresolved factual issues. At most, the inconvenience occasioned by the need for some cross-examination should be an element to be weighed when the court considers the ripeness issue. Once the court has found that the regulation is ripe for judicial review, however, there would seem to be extraordinary awkwardness in trying to determine its validity without regard to the factual problems, leaving their resolution to another day. Such a bifurcation can rarely satisfy the interests of either side. To be sure, Congress's allocation of review jurisdiction between the district courts and the courts of appeals may mean that the courts are reduced to a Hobson's choice—between the inconvenience of bifurcation on the one hand and that of trial direct by the court of appeals or its reference to a master on the other.[220]

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[214] The court in *Walter Holm* was evidently too optimistic in its hope that ambiguities in the relationship between the tomato industry and the Secretary of Agriculture could be resolved, or at least rendered irrelevant, in hearings conducted before the Department with a right of cross-examination. Litigation inquiring into that relationship has not yet abated. *See* cases cited note 110 *supra*.

[215] *Cf.* 28 U.S.C. § 2347(b)(3) (1970), discussed in note 213 *supra*.

[216] A factual inquiry by the court of appeals is a conceivable alternative. *See* note 84 *supra*.

[217] Some basis for jurisdiction would also, of course, be necessary. In circuits recognizing sections 702, 703, and 704 as jurisdictional grants, the search would be easy, at least if the arguments in the text are accepted. Elsewhere, an independent basis of jurisdiction would be necessary. For a recent summary of cases on the issue, see Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974).

[218] 481 F.2d 162, 173 (6th Cir. 1973); *cf.* Verkuil, *supra* note 64, at 204. *But cf.* Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 355-356 (3d Cir. 1972).

V. The Utility of Procedures Less Onerous Than Cross-Examination

Attention must now be directed at the three methods that the EPA has employed in its effort to assure challengers of its rules a meaningful "opportunity to participate" in the rulemaking process: (1) an advance written statement of methodology; (2) an inquiry conference, on- or off-the-record; and (3) written agency answers to interrogatories. In a way it is a pity to have to itemize them into categories, for one gets the impression that it is the deft meshing of the devices that is most effective in complying with the spirit of the hybrid rulemaking cases. Nonetheless, it seems necessary to distinguish among them in order to describe them.

A. Written Statements of Methodology

In at least four cases, the EPA has tried to furnish (or has committed itself to furnishing) a clear statement of its methodology well in advance of any final agency action, thus permitting detailed criticism. These instances include the remands in *International*

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[219] Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967); *cf.* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 Mich. L. Rev. 1443, 1502-04 (1971).

[220] *See* cases cited at note 84 *supra*.

Harvester,[221] *Appalachian Power*,[222] and *Portland Cement*,[223] and the EPA's entire process for promulgating effluent limitations guidelines under the Federal Water Pollution Control Act.[224] In *Appalachian Power*, the process has begun fairly recently, pursuant to the stipulations by the parties. In *Portland Cement*, the EPA's draft engendered extensive comment, but its final statement in essence reaffirmed the original standards. The challengers again sought judicial review, but in doing so they virtually abandoned the technical arguments that had been the occasion of the remand, preferring instead to press constitutional claims that the court of appeals had already rejected.[225] The court of appeals affirmed the standards per curiam.[226] This history suggests that the remand performed its intended function.[227] It is an open question, however, whether it would have accomplished as much in the absence of an appellate opinion pinpointing what the court perceived as material substantive gaps. The *International Harvester* and effluent limitations instances require more extensive discussion.

Shortly before the public hearing on remand in *International Harvester*, the EPA made available to the auto companies a forty-eight page statement of its proposed methodology. The statement essentially mooted one of the auto companies' major criticisms of the first proceeding—namely, that the agency's failure to analyze the data in terms of "engine families" invalidated its results.[228] The challengers had advanced two arguments against that omission. First, EPA procedures for certifying the manufacturers' production lines did proceed engine-family-by-engine-family; consequently, the omission had highlighted the agency's failure to link the reasoning by which it concluded that the manufacturers did not need an extension to the criteria by which it would later grant or deny certification to produce autos. Because each engine family presents a unique pollution problem, awareness of such a link had been important to the companies. Second, the omission had made it impossible to develop any theory for predicting what portion of the nation's total 1975 auto demand could be satisfied if 1975 standards were not suspended.[229] Issuance of the EPA's proposed methodology resolved the entire issue, and, by articulating definitions of the various engine families, made it possible for the controversy to move to more refined issues: details of the process of making predictions for each engine family. Later, when EPA staff and auto company technicians met in Ann Arbor in an off-the-record conference, the proposed methodology provided a starting point for discussion.[230]

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[221] Pursuant to court direction, International Harvester Corp v. Ruckelshaus 478 F.2d 615, 631-33, 649 (D.C. Cir. 1973).

[222] As a result of settlement stipulations, Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973); *see* text and note at note 169 *supra*.

[223] Pursuant to court direction, Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375, 392-95, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[224] 38 Fed. Reg. 21202 (1973).

[225] *See* Brief of Petitioner Following Remand, D.C. Cir. No. 72-1073.

[226] Portland Cement Ass'n v. Train, 513 F.2d 506 (D.C. Cir. 1975).

[227] *See* note 175 *supra*.

[228] Joint Supplement to Briefs of Petitioners General Motors Corp., Chrysler Corp. and Ford Motor Co. 6-8, 10-11; Ford Motor Co. Brief 33-35; Ford Reply Brief 7-11. Note that, even apart from the directions from the court, the process of litigation itself may have constituted part of the dialogue between the auto companies and EPA.

Another example of how the EPA's announcement of its methodology on remand led to fruitful criticism was the agency's adoption of the "Monte Carlo" statistical technique. On remand, the EPA asked the manufacturers to submit proposals for the methodology to be used, and the Monte Carlo method was suggested by General Motors.[231] The method permits one to transform data that varies on a random basis into usable predictions. For example, in different tests of the same car, emission levels vary randomly.[232] By means of the Monte Carlo method, it is possible to derive a figure indicating the maximum emission level for cars of that type with a ninety-five percent probability of accuracy.[233] The technique thus made it possible for the agency to comply with the appellate court's demand that its predictions have demonstrable "statistical reliability."[234]

The EPA's device for promulgating effluent limitation guidelines under the Federal Water Pollution Control Act represents a systematic transformation of rulemaking into a two-round process, instead of the single round minimally required by section 553. Prior to its initial notice of proposed rulemaking, the EPA makes available to any interested person a technical analysis of the issues, prepared by private consultants under contract with the EPA. Public comments on these drafts are solicited, and only afterwards does the EPA promulgate its proposed rule. Simultaneously with the notice of proposed rulemaking, it publishes its own draft report trying to substantiate the proposed rules.[235] Agency personnel did not describe this procedure as a product of the hybrid rulemaking cases,[236] although the agency's adoption of the procedure may reflect its internalization of the norm imposed in those cases. From the agency's point of view, the process is not a burden but simply an efficient way of carrying out its substantive mandate.[237]

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[229] *Cf.* 478 F.2d at 640-41.

[230] Telephone interview with Thomas Austin, EPA staff, Oct. 1, 1974.

[231] *See* Technical Appendix to EPA Administrator's April 11, 1973 Decision, at 38.

[232] *Id.* at 38-40.

[233] Of course, this confidence level assumes the accuracy of the data and the soundness of all other aspects of the methodology.

[234] 478 F.2d at 648; see the use of figures in the Administrator's April 11, 1973 decision, 38 Fed. Reg. at 10323.

[235] *See* 38 Fed. Reg. 21202-06 (1973).

B. Inquiry Conferences

What I have called the "inquiry conference" has figured in a variety of EPA proceedings: the *International Harvester* case, both originally and on remand; the agency's "hearing" on flue-gas desulfurization ("FGD"); and the agency's promulgation of effluent guidelines under the Water Pollution Control Act for the pulp and paper industry and for the steam electric power industry.

The agency's original hearing on the auto companies' application for a one-year suspension of standards represented something of an innovation. Speakers for affected companies and interest groups delivered statements, and were subjected to questions from the members of the EPA panel, which sometimes included the Administrator and almost always the Assistant Administrator for the Office of Enforcement and General Counsel. In addition, everyone in the audience was free to submit written questions to members of the panel, who would then usually put the question or its substance to the speaker. Counsel for Ford Motor Company and for the Natural Resources Defense Council were the most active submitters of questions. In the remand hearing, which followed the same procedure, one such question hit extraordinary paydirt: in response to a question from the NRDC lawyer, a representative of Engelhard Industries (a catalyst manufacturer) testified that Chrysler executives had told him that they were refusing to buy catalysts from Engelhard in order to punish the company for its testimony in the original hearings.[238] Chrysler escaped denial of suspension only because the economic consequences of selective denial were so drastic; EPA felt virtually bound to find "good faith" unless confronted with absolute proof of its absence.[239]

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[236] *E.g.*, interview with Robert V. Zener, Deputy General Counsel, at Washington, D.C., Aug. 19, 1974. One EPA lawyer expressly denied that the procedure was in any way attributable to the line of cases analyzed in this article. Interview with G. William Frick, at Washington, D.C., Aug. 21, 1974.

[237] The EPA declared in its announcement of the proposed procedures: "EPA believes that the exposure of the technical basis and reasoning underlying regulations to be established pursuant to sections 304(b), 306 and 307(c) is essential to the promulgation of sound effluent limitations guidelines and standards of performance for new sources." 38 Fed. Reg. at 21202.

The FAA, the CAB, the FPC, and the ICC, and perhaps other agencies, have (both before the earliest and after the latest of the hybrid rulemaking cases) employed an "Advance Notice of Rulemaking" to achieve what amounts to two rounds of notice and comment. *See*, for example, FAA notices published at 39 Fed. Reg. 45044 (Dec. 30, 1974); 39 Fed. Reg. 11193 (Mar. 26, 1974); 39 Fed. Reg. 5785 (Feb. 15, 1974) (initiating a process called "First Biennial Airworthiness Regulations Review," promulgating a schedule contemplating final adoption of any resulting amendments in February 1976 and providing not only for two full rounds of notice and comment but also for conferences to elucidate issues); 38 Fed. Reg. 14757 (June 5, 1973); and CAB notices published at 37 Fed. Reg. 15518 (Aug. 3, 1972); 36 Fed. Reg. 20309 (Oct. 20, 1971); and 36 Fed. Reg. 2514 (Feb. 5, 1971).

The two rounds of notice and comment initiated by these advance notices should be distinguished in purpose from the two rounds that were initiated by the EPA in the water effluent guidelines context. For the EPA, the focus was on assuring a full canvass of complex scientific, technological, and economic issues. In the FAA and CAB notices, however, the agency has sketched out an area under consideration, suggested some issues that ought to be resolved, and called for comment in a very openended fashion. The FAA-CAB two-round process is thus less sharply tailored to the resolution of complex methodological issues.

In addition to the public hearings on remand, the EPA arranged for an off-the-record conference in Ann Arbor on technical methodology. At this meeting, auto company experts were able to state in detail their objections to the proposed methodology, and the EPA technical staff were able to respond. Substantial modifications were made as a result of the meeting.[240] The style of the meeting was relatively informal, featuring more rapid-fire, spontaneous give-and-take than was characteristic of the hearings before the EPA panel.

The other inquiry conferences amounted to variations on the above themes. The conference on effluent guidelines for the pulp-and-paper industry, called by the EPA in response to pressure from industry representatives, was largely dominated by speeches by industry spokesmen. Although the industry participants were invited to put questions to the agency technical staff,[241] they chose not to do so. The agency technical staff questioned them closely, on the other hand, probing the theories behind their complaints.[242] Thus, by choice of the industry representatives, the conference did nothing to clarify agency reasoning for them. In similar hearings in connection with steam electric power plants, however, industry representatives used their opportunity, so that the flow of questioning went both ways. This conference, like the Ann Arbor meeting, constituted the EPA's alternative to the cross-examination right demanded by industry.[243] Unlike the Ann Arbor meeting, it was on-the-record.

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[238] Emissions Suspension Remand Hearings at 982-95, 1020-40.

[239] *See* 38 Fed. Reg. at 10327-330.

[240] Telephone interviews with William F. Pedersen, EPA staff attorney, and Thomas Austin, EPA technical staff, Oct. 1, 1974.

[241] Technical Meeting—Effluent Limitations Guidelines for Pulp, Paper and Paperboard Manufacturing Point Source Category and Builders Paper Board Manufacturing Point Source Category, April 4, 1974, at 8-10.

[242] *Id.*, *passim*.

The FGD hearings were unique in that they were aimed not at making a "rule," but at policy-making in a broader sense. The report that emerged from the conference produced recommendations in three categories: (1) recommendations addressed to the utility companies, in essence exhorting them to get cracking; (2) recommendations addressed to the EPA itself and to the states, urging them to direct a variety of carrots and sticks toward the utilities; and (3) recommendations relating to the sequence and pacing of compliance schedules to be developed by negotiation between the utilities, the states, and the EPA.[244] The hearing was not viewed as a means of conforming to the mandates of the hybrid rulemaking cases, but rather as a catalyst for resolution of some fundamental policy issues at a high executive level.[245] As in the auto emissions suspension hearings, an EPA panel presided. Here the flow of questions went in every direction: from the EPA panel to industry representatives and to EPA technical experts; from EPA technicians to industry technicians, and the reverse; and even from industry representatives to other industry representatives.

At least from the EPA's point of view, the FGD hearing was a sound investment of time. Although the EPA did not lose its basic belief in the efficacy of FGD, the hearing did persuade high-level EPA personnel of the reality of several utility industry problems: (1) the greater readiness of state regulatory commissions to allow utilities to pass through the costs of switching to low-sulfur fuel, on the one hand, than to permit similar pass-throughs of FGD installation costs, on the other; (2) the seriousness of the problems relating to FGD malfunctions and the need to reassure the power companies that malfunctions would not impose substantial risks of noncompliance penalties; and (3) the industry's difficulties in trying to achieve the designated goals within the time spans proposed by EPA.[246]

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[243] Counsel for the Utility Water Act Group, George Freeman, indicated in a telephone interview that EPA's conduct up through the inquiry conference was consistent with its duties under the *International Harvester* case, notwithstanding the absence of cross-examination. September 10, 1974.

[244] Report of the EPA Hearing Panel, National Public Hearings on Power Plant Compliance with Sulfur Oxide Air Pollution Regulations [hereinafter cited as FGD Report] 9-10 (January 1974).

[245] Interview with Richard Wilson, Director, Division of Stationary Source Enforcement, EPA, at Washington, D.C., Aug. 22, 1974.

[246] *Id.*; FGD Report at 8-9, 63-65.

Are these conferences more effective on- or off-the-record? Each alternative has the defects of its virtues. The off-the-record approach makes it possible for participants to be less cagey, more open, and better able to focus upon the search for truth; by the same token, it offers the anxious participant little or no assurance that he has pinned the other side down to any position. The calculus for the on-the-record conference presents a mirror image. Resolution of the issue must turn on particular facts.[247]

C. Interrogatories

The third discrete device is to send interrogatories to the agency. This approach was employed by counsel for the steam electric power plants in connection with the setting of effluent limitations guidelines. Its desirability depends on the comparative advantages of written as against oral questioning. Again, each seems appropriate in its place. Relying on written questions is time-consuming and the answers are inevitably labored; and, to be effective, the device may require follow-up in the form of additional interrogatories or oral questioning. The conference approach, on the other hand, permits rapid exchange of questions and ideas, but with the risk that statements will be made clumsily and will leave what in hindsight appears to be a murky record.

D. The Judicial Role

Although we saw a number of doctrinal difficulties that may arise when a court seeks to implement a challenger's right to cross-examination in rulemaking proceedings, courts should have few problems inducing agencies to adopt hybrid rulemaking procedures like the ones discussed in this section. Probably the style of remand typified by *Chenery I* offers a satisfactory framework. The premise in all "hybrid rulemaking" cases is that the challengers have raised questions about the agency's substantive action that are so serious that the agency must justify its position more adequately than it has. This is the essence of a *Chenery*-type remand, which affords an agency an opportunity to identify whatever links it purports to find between its action and its substantive mandate. The distinctive feature in the cases now under discussion is that the inadequacy of the agency's explanation results from its failure to have made it possible for the challengers to identify and critique its methodology earlier in the proceedings.[248] It would not seem a material extension of *Chenery* if the court, in ordering such a remand, were to point out the problem. The agency would then be on notice that if it again failed to give the challengers an adequate opportunity to critique it in advance, it would only be exposing itself to the risk of yet another round: not because of its failure to adhere to any particular procedure, but because its reasoning would still appear insufficient in the face of the challengers' factual contentions. Thus, a court can assure that issues are aired sufficiently for it to perform its function of substantive review, without impinging upon the ability of the agency to select the procedural devices that appear most suitable in light of the substantive issues involved and the agency's institutional capacities.

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[247] Note that the stipulations settling *Appalachian Power* gave the choice between an on-the-record or off-the-record conference to the challengers of the rule. *See* text and note at note 169 *supra*.

CONCLUSION

In closing, it is appropriate to point out the aspect of the hybrid rulemaking cases that seems to enjoy the greatest capacity for growth. All the features of cross-examination that set it apart from "normal" rulemaking procedural techniques have made it seem—deceptively, I suggest—particularly attractive to the courts that have found "notice-and-comment" inadequate in four of these cases. When the relatively modest role of cross-examination on remand is examined, the attractions are diminished. What emerges as more vital, and certainly more readily susceptible to frequent application, is the principle of assuring challengers timely access to the critical reasoning processes of the agencies.

In making that access real, the cases have helped to generate a series of flexible devices: double rounds of notice-and-comment; conferences with varying degrees of formality; and agency answers to interrogatories. Although for many rulemaking proceedings the use of even one of those devices might be overkill, for others—where decisions of dramatic economic or social impact are at stake—they represent useful tools for disciplining agency action without entangling it in elaborate procedures. Whether a court should ever mandate the use of any particular device seems doubtful. But the courts may insist that the "opportunity to participate" afforded by section 553 be meaningful; and they may demand that agencies develop a record that enables a reviewing court to find an intelligible answer for each substantial challenge posed.[249] Under these judicial pressures, agencies should be able to work out the detailed procedures most suitable to each specific task.

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[248] *But cf.* South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974), reviewing the EPA's Metropolitan Boston Air Quality Transportation Plan. The court noted that a need for further hearing arose out of the petitioners' failure to present to the EPA the data that they had presented to the court. Thus the defect arose from petitioners' "fault," but the court justified its imposition of a burden on the EPA by noting the importance of the subject to the public at large. *Id.* at 666. This article has not analyzed the *South Terminal* case in detail, because the hearing on remand was to be conducted under the same ground rules that the EPA had applied originally. Thus, the case did not impose new procedural standards on the EPA; it was simply a remand for more of the same.

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[249] For recent discussion of the problem of establishing a "record" for purposes of notice-and-comment rulemaking, see Recommendation 74-4, 1973-74 REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 58; Pedersen, *Informal Ruelmaking at the Environmental Protection Agency*, to be published in a forthcoming issue of YALE L.J. (title may differ). *See also* Texas v. EPA, 499 F.2d 289, 321-22 (5th Cir. 1974), in which Judge Clark, concurring, noted: "No formal hearing has ever been held in this highly technical, factually complex matter. The administrative 'record' upon which we had to base our review was comprised of only the sparest of documentation, for it essentially evolved from an act of agency rulemaking . . . ."

REPORT IN SUPPORT OF RECOMMENDATION 76-4

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JUDICIAL REVIEW UNDER FEDERAL POLLUTION LAWS

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In an effort to remedy "uncertainties" in their predecessor statutes, which were silent on the subject,[1] both the Clean Air Act[2] (CAA) and the Federal Water Pollution Control Act[3] (FWPCA) were amended in the early 1970's to include explicit provisions for judicial review. Experience has shown, however, that uncertainties persist; the time has come for legislative re-examination.

Both statutes are administered by the United States Environmental Protection Agency (EPA). Both are extraordinarily complicated. Both preserve provisions for federal research and training programs,[4] for financial assistance to state control programs,[5] and for the encouragement of uniform state laws and interstate control agencies.[6] The CAA authorizes the adoption of federal regulations prescribing standards of performance for new stationary sources of pollution endangering public health,[7] emission standards for sources of "hazardous" pollutants,[8] emission standards for vehicles[9] and for aircraft,[10] and standards for the composition of fuels.[11] Upon federal adoption of ambient air quality standards[12] for various pollutants, the states are to develop, subject to federal review, plans to implement those standards through emission limitations and other regulatory measures.[13] While the states are expected to bear a substantial part of the burden of enforcing implementation plans, their provisions as well as federally adopted standards are also enforceable by the Federal EPA.[14]

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[1] *See* S. Rep. No. 1196, 91st Cong., 2d Sess. 40 (1970).

[2] Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 101-403, 84 Stat. 1676 (codified at 42 U.S.C. §§ 1857-1858(a) (1970)) [hereinafter cited as CAA].

[3] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, §§ 101-516, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (Supp. V 1975)) [hereinafter cited as FWPCA].

[4] FWPCA § 104, 33 U.S.C. § 1254 (Supp. V 1975); CAA § 103, 42 U.S.C. § 1857b (1970).

[5] FWPCA § 106, 33 U.S.C. § 1256 (Supp. V 1975); CAA § 105, 42 U.S.C. § 1957c (1970).

[6] FWPCA § 103, 33 U.S.C. § 1253 (Supp. V 1975); CAA § 102, 42 U.S.C. § 1857a (1970).

[7] CAA § 111, 42 U.S.C. § 1857c-6 (1970).

[8] *Id.* § 112, 42 U.S.C. § 1857c-7.

[9] *Id.* § 202, 42 U.S.C. § 1857f-1.

[10] *Id.* § 231, 42 U.S.C. § 1857f-9.

[11] *Id.* § 211, 42 U.S.C. § 1857f-6c.

[12] *See id.* § 109, 42 U.S.C. § 1857c-4.

[13] *Id.* § 110, 42 U.S.C. § 1857c-5.

[14] *Id.* § 113, 42 U.S.C. § 1857c-8.

The Act also retains, in vestigial form, a cumbersome conference procedure for abatement of pollution.[15]

The heart of the FWPCA is a permit system, administration of which may be delegated to the states under specified conditions.[16] Permits are to be issued if the discharger complies with a complex array of standards, including federal effluent standards for "toxic" pollutants[17] and standards of performance for new sources.[18] In addition, private point sources must employ by July 1, 1977, the "best practicable control technology currently available" and by July 1, 1983, the "best available technology economically achievable"; publicly owned treatment works, by the same dates, are required to implement "secondary treatment," and the "best practicable waste treatment technology," respectively.[19] Permittees must also comply with applicable state requirements and with any limitation required to implement water quality standards,[20] which are adopted by states subject to federal review.[21] More stringent federal standards are to be adopted, subject to some economic constraint, when necessary to protect legitimate water uses.[22] Federal standards are also to be adopted to govern wastes from vessels,[23] and there are special provisions for the discharge of oil or other hazardous substances[24] and for the deposit of dredgings[25] and sewage sludge.[26] Federal enforcement of these standards and provisions is authorized.[27] Grants are provided for the construction of publicly owned treatment facilities.[28]

Section 509(b) of the FWPCA provides for judicial review of certain federal standards and limitations regulating the discharges of pollutants, of federal action in passing upon state permit programs, and of federal issuance or denial of permits, upon the filing of an application by "any interested person" in the "Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business"[29] within ninety days after the challenged action is taken.[30] Section

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[15] *See id.* § 115, 42 U.S.C. § 1857d.

[16] FWPCA § 402(b), 33 U.S.C. § 1342(b) (Supp. V 1975).

[17] *Id.* § 307, 33 U.S.C. § 1317.

[18] *Id.* § 306, 33 U.S.C. § 1316.

[19] *Id.* § 301(b), 33 U.S.C. § 1311(b).

[20] *Id.*

[21] *Id.* § 303, 33 U.S.C. § 1313.

[22] *Id.* § 302, 33 U.S.C. § 1312.

[23] *Id.* § 312, 33 U.S.C. § 1322.

[24] *Id.* § 311, 33 U.S.C. § 1321.

[25] *Id.* § 404, 33 U.S.C. § 1344.

[26] *Id.* § 405, 33 U.S.C. § 1345.

[27] *Id.* § 309, 33 U.S.C. § 1319.

[28] *Id.* §§ 201-207, 33 U.S.C. §§ 1231-1237.

[29] Since 1948 the correct title has been "United States Court of Appeals," each with jurisdiction over a "circuit" containing several "districts." *See* 28 U.S.C. § 43(a) (1970).

[30] FWPCA § 509, 33 U.S.C. § 1369(b) (Supp. V 1975) provides in substantial part:

> (b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D)

307(b) of the CAA, allowing only thirty days and not specifying by whom review may be sought, separates most of those actions reviewable in the courts of appeals into two classes:[31] national ambient air quality standards, federal emission standards, and federal fuel standards are to be reviewed "only in the United States Court of Appeals for the District of Columbia"; the EPA Administrator's "action in approving or promulgating any implementation plan" is reviewable "only in the United States Court of Appeals for the appropriate circuit."[32] Under both statutes, "action of the Ad-

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> in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.
>
> (c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

[31] Section 110(f) of the CAA, 42 U.S.C. § 1857c-5(f)(2)(B) (1970), provides for review of determinations respecting state applications for postponement of implementation plan requirements in "the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person."

Section 206(b)(2)(B)(ii) of the CAA, 42 U.S.C. § 1857f-5(b)(2)(B)(ii) (1970), authorizes review of determinations respecting suspension or revocation of motor vehicle compliance certificates upon petition by "the manufacturer" in "the United States court of appeals for the circuit wherein such manufacturer resides or has his principal place of business" in "any case of actual controversy as to the validity of [such] determination."

[32] CAA § 307, 42 U.S.C. § 1857h-5 (Supp. V 1975) provides:

> (b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within

ministrator with respect to which review could have been obtained" under the foregoing provisions "shall not be subject to judicial review in civil or criminal proceedings for enforcement."[33] In addition, both statutes contain citizen-suit provisions authorizing "any person"[34] or any person "having an interest which is or may be adversely affected"[35] to file an action in federal district court against the Administrator for "failure of the Administrator to perform any act or duty under this [Act] which is not discretionary."[36]

> 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.
>
> (c) In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce such additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with return of such additional evidence.

[33] FWPCA § 509(b)(2), 33 U.S.C. § 1369(b)(2) (Supp. V 1975); CAA § 307(b)(2), 42 U.S.C. § 1857h-5(b)(2) (1970). *See* notes 29, 30 *supra*.

[34] CAA § 304(a), 42 U.S.C. § 1857h-2(a) (1970).

[35] FWPCA § 505(a), (g), 33 U.S.C. § 1365(a), (g) (Supp. V 1975).

[36] FWPCA § 505(a), 33 U.S.C. § 1365(a) (Supp. V 1975); CAA § 304(a), 42 U.S.C. § 1857h-2(a) (1970). In both Acts the citizen-suit provisions read in substantial part:

> (a) Except as provided in subsection (b) [of this section], any [person (title 33) or citizen (title 42)] may commence a civil action on his own behalf—
>
> . . . .
>
> > (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to order the Administrator to perform such act or duty . . . .
>
> (b) No action may be commenced—
>
> . . . .
>
> > (2) under subsection (a)(2) [of this section] prior to 60 days after the plaintiff has given notice of such action to the Administrator,
>
> except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of [§ 1857c-7(c)(1)(B) of title 42, or §§ 1316 and 1317(a) of title 33, or an order issued by the Administrator pursuant to § 1857c-8(a) of title 42]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

. . . .

(d) The court, in issuing any final order in any action brought pursuant to [subsection (a) of] this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any [emission or effluent] standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Sorting out who may take which cases to what courts and when they may do so under these provisions has already yielded a bumper crop of litigation. This Article undertakes to analyze and criticize the judicial review provisions under the federal pollution laws and the cases interpreting them and to suggest legislative and judicial improvements.[37]

I. ACTIONS SUBJECT TO REVIEW

Not every action of the Administrator under the CAA and the FWPCA is expressly made reviewable. For example, nothing is said about judicial review of regulations respecting the discharge of sewage from vessels[38] or the discharge of oil and other hazardous materials;[39] of the decision to allow additional time to control the emission of "hazardous" air pollutants;[40] or of the various determinations to be made with respect to grants for sewage treatment plant construction.[41] In some such cases a citizen suit will lie under the quasi-mandamus provisions to compel performance of a non-discretionary duty, as when the Administrator was ordered to allot the sums appropriated for construction grants under the FWPCA.[42] As I shall attempt to show below,[43] however, these provisions cannot be stretched into a general mandate for reviewing all actions on the merits. In cases beyond their scope one must ask whether judicial review can be had on some basis outside the pollution statutes themselves.

The Federal Administrative Procedure Act (APA) provides that, "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law,"[44] "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[45] These provisions, the Supreme Court has said, embody a "basic presumption of judicial review": "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[46] Therefore the mere omission of an action of the Administrator from the explicit review provisions of the CAA and the FWPCA does not demonstrate that such action cannot be reviewed;[47] one must ask in each instance whether the omission reflects a congressional desire to preclude review or to commit the question to agency discretion, and, if not, whether independent jurisdictional grounds exist outside the pollution statutes to support a judicial challenge.

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[37] This Article was originally prepared as a report to the Administrative Conference of the United States. The Conference acted on most of the recommendations of that report in December 1976. *See* 41 Fed. Reg. 56,768 (1976). The Article reflects the action of the Conference and other recent developments.

[38] FWPCA § 312, 33 U.S.C. § 1322 (Supp. V 1975).

[39] *Id.* § 311, 33 U.S.C. § 1321.

[40] CAA § 112, 42 U.S.C. § 1857c-7(c)(1)(B)(ii) (1970).

[41] FWPCA § 204, 33 U.S.C. § 1284 (Supp. V 1975).

[42] *See* Train v. City of New York, 420 U.S. 35 (1975), in which jurisdiction was not discussed.

[43] *See* text accompanying notes 207-11 *infra*.

[44] 5 U.S.C. § 701(a) (1970).

[45] *Id.* § 704.

[46] Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 141 (1967) (citation omitted).

[47] *Abbott Laboratories v. Gardner* held that the inclusion of specific provisions for review of certain actions need not imply that the failure to provide for review of others was an attempt to preclude review.

Finding independent jurisdictional grounds is easy. A claim that the Administrator has erred in carrying out duties imposed by federal statute is a claim arising under federal law,[48] and the $10,000 jurisdictional minimum for such cases was recently made inapplicable to any action "against the United States, any agency thereof, or any officer or employee thereof in his official capacity."[49] The same act amended the APA to do away with any lingering possibility that actions for nonmonetary relief against federal officers might be barred by sovereign immunity or for failure to join the United States as a party.[50] The Declaratory Judgment Act provides a remedy.[51] Thus, assuming a ripe controversy and a plaintiff with standing, the only question is whether Congress meant to preclude review.

The quasi-mandamus provisions expressly declare that they do not preclude judicial review of actions they do not cover: "Nothing in this section shall restrict any right which any person . . . may have under any statute or common law . . . to seek any other relief . . . ."[52] The provisions for review by federal courts of appeals are silent on this question, but the House Committee was explicit in respect to section 509 of the FWPCA: "The inclusion of section 509 is not intended to exclude judicial review under other provisions of the legislation that are [sic] otherwise permitted by law."[53] Legislative history is not so clear with respect to section 307 of the CAA, but again it gives no evidence of a purpose to limit review. The Senate Report states that the purpose of section 307 was the removal of "uncertainty" as to the availability of judicial review and that the "precluding of review does not appear to be warranted or desirable"; it says nothing about actions omitted from section 307.[54] In the case of neither statute, therefore, can there be a showing of "clear and convincing evidence" of an intention to restrict nonstatutory review generally. It remains possible, however, that review of particular actions may be found precluded or otherwise inappropriate.

A. State Action on Water Permits

Section 402 of the FWPCA[55] authorizes the Administrator, or upon his certification a state, to issue permits allowing the discharge of pollutants.

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[48] The claim therefore falls within 28 U.S.C. § 1331 (1970), the "federal question" provision. *Id.* § 1331(a).

[49] Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6553 (amending 28 U.S.C. § 1331 (1970)).

[50] *Id.* § 1, at 6577 (amending 5 U.S.C. § 702 (1970)).

[51] 28 U.S.C. § 2201 (1970).

[52] CAA § 304(e), 42 U.S.C. § 1857h-2(e) (1970); FWPCA § 505(e), 33 U.S.C. § 1365(e) (Supp. V 1975).

[53] H.R. REP. NO. 911, 92d Cong., 2d Sess. 136 (1972).

[54] S. REP. NO. 1196, 91st Cong., 2d Sess. 40-41 (1970).

[55] 33 U.S.C. § 1342(a), (b) (Supp. V 1975).

Section 509(b)[56] provides for review of the Administrator's action under section 402 by federal courts of appeals; it is silent with respect to review of state action. A claim that a state official has issued or denied a permit because of a misapplication of the federal statute or regulations would "aris[e] under" federal law; sovereign immunity would not be a barrier to an injunctive or declaratory action because the officer allegedly would be acting beyond his authority;[57] at least if the amount in controversy exceeded $10,000,[58] there would be district court jurisdiction unless review is precluded.

Finding a cause of action on the merits might be more difficult. Both the applicant injured by an erroneous denial and the pollutee injured by an erroneous grant appear to be within the protective purpose of the federal law they seek to enforce,[59] but that is not always sufficient.[60] The statute does require that an approved state program "at all times be in accordance with" section 402 and with guidelines issued under section 304,[61] but it explicitly provides two different remedies in case of noncompliance: EPA veto of the individual permit grant[62] and revocation of approval of the state program.[63] Nevertheless, the inference that Congress meant to leave applicants without a remedy for unlawful denial of a permit seems so harsh as to be highly improbable; and the provision that "compliance with a permit . . . shall be deemed compliance" with most provisions of the federal statute,[64] coupled with the apparent legislative understanding that the EPA's veto power would be sparingly exercised,[65] is powerful evidence that some review of an erroneous grant is necessary to carry out the statutory purpose of sections 304 and 402 of the FWPCA.

But the inference is strong that any such review should be had, subject to possible Supreme Court supervision,[66] in a state court. The omission of state permit action from review in federal courts of appeals does not seem inadvertent, since Congress explicitly provided for such review of identical federal actions under the same section. No reason appears for thinking Congress preferred district court review for state permit action, since the statute contemplates identical hearings before state and federal agencies.[67] If federal review were to be provided, the treatment of comparable federal action suggests it would have been in the appellate court. The omission, therefore, is persuasive if not compelling evidence of an intention to preclude all initial federal court review, especially since the presence of a state officer as defendant and the probable existence of ancillary state law issues furnish plausible reasons for such a decision.[68]

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[56] *Id.* § 1369(b).

[57] *See Ex parte* Young, 209 U.S. 123, 159-60 (1908); *cf.* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 698-702 (1949).

[58] *See* 28 U.S.C. § 1331 (1970). An action charging violation of the statute, and arguably also one charging violation of regulations under it, would also fall within 28 U.S.C. § 1337 (1970), which gives jurisdiction without regard to amount of actions arising under statutes "regulating commerce," if the interpretation of two courts of appeals is accepted. *See, e.g.*, Imm v. Union R.R., 289 F.2d 858, 859-60 & n.3 (3d Cir. 1961); D. CURRIE, FEDERAL COURTS 533-34 (2d ed. 1975).

[59] *See* J.I. Case Co. v. Borak, 377 U.S. 426, 433-35 (1964).

[60] *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 455-56, 458, 462, 464-65 (1974).

[61] 33 U.S.C. § 1342(c)(2) (Supp. V 1975).

[62] *Id.* § 1342(d)(2).

[63] *Id.* § 1342(c)(3).

[64] *Id.* § 1342(k).

[65] *See* Mianus River Preservation Comm. v. Administrator, 541 F.2d 899, 907-09 (2d Cir. 1976).

[66] *See* 28 U.S.C. § 1257 (1970).

B. Vehicle Emission Standards

Section 307(b) of the CAA provides for review by federal courts of appeals of new motor vehicle emission standards "other than a standard required to be prescribed under section 202(b)(1)"—in other words, except for the hydrocarbon, carbon monoxide, and nitrogen oxide standards applicable to "light-duty vehicles" manufactured during or after "model year" 1975. Two alternative inferences may be drawn from this exception, since it clearly is not an accident: that the excepted standards are reviewable under general federal law in the district courts, or that they are not reviewable at all. It is difficult to imagine any reason why these standards, in contrast to other new motor vehicle standards, are more suitable for pre-enforcement review in the district rather than the circuit courts. Perhaps a more plausible explanation is that Congress foresaw, first, little scope for judicial review because the contents of these regulations are very precisely prescribed in the statute; and second, little time for review because of the short lead time before compliance was required. Moreover, Congress may have thought it was providing an ample safety valve in section 202(b)(5), which allows a one-year extension of the 1977 carbon monoxide and hydrocarbon standards upon proof of specified hardships. The denial of an extension is subject to judicial review in the courts of appeals.

None of these, however, is a sufficient reason for excluding judicial review altogether. That the 1977 and 1978 light-duty vehicle standards must require a ninety percent reduction in the exhaust levels of earlier vehicles by no means eliminates the possibility of disputes over what the earlier levels were; that the Administrator's 1975 standards were specifically incorporated into the statute does not immunize them from constitutional attacks, however unlikely to succeed. Furthermore, the extension provision neither applies to nitrogen oxides, nor allows more than a single year's respite, nor permits an attack upon the validity of the regulation. Thus, there may indeed be occasions for judicial review of these standards.

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[67] *See* FWPCA § 509(a)(1), (b)(3), 33 U.S.C. § 1342(a)(1), (b)(3) (Supp. V 1975). The EPA regulations, while providing both a "public hearing" and an "adjudicatory hearing" upon federally issued permits, *see* notes 102 and 103 *infra*, require only the former for state permits, and then only if there is "a significant public interest." 60 C.F.R. § 124.36 (1976). The consistency of this provision with the statutory requirement of a "public hearing" in this adjudicative context seems questionable; in any case the EPA practice is hardly indicative of a congressional intention to differentiate between state and federal permits, for the statute uses the same word for both.

[68] *Cf.* Mianus River Preservation Comm. v. Administrator, 541 F.2d 899, 906 (2d Cir. 1976).

That pre-enforcement review may be obstructed by the pressures of time does not mean that a manufacturer subjected to sanctions for violating the standards should be prohibited from challenging them at that time; indeed the assumption of *Yakus v. United States*[69] is that, at least where judicial enforcement is sought, he must be allowed to do so unless he has had an adequate prior opportunity. In contrast to the situation involving state permit action under the FWPCA, state court review does not seem a realistic possibility.[70] The serious constitutional question that would be posed if the EPA were permitted to impose sanctions for violations of regulations that were never subject to challenge, and the Supreme Court's interpretation of the APA as requiring a "clear and convincing" showing of intent to preclude judicial review, suggest that nonstatutory review of the emission standards excepted from section 307 is not precluded.

C. Enforcement Notices and Orders

One case in which nonstatutory review was held unavailable is *West Penn Power Co. v. Train*.[71] West Penn had been served with a thirty-day notice for violation of implementation plan provisions respecting particulates and sulfur oxides. It filed an action in the district court, alleging that it was in compliance with the plan.[72] The court of appeals correctly held that, because the validity of the plan was not under attack, the action was not barred by section 307's thirty-day limitation or venue provisions.[73] Nevertheless, the court gave three reasons for holding that the action could not be maintained: The notice of violation was not a "final" agency action as required by the APA; whether to enforce the notice by further administrative or judicial proceedings was committed to the Administrator's discretion; and in any event the APA provided no basis for jurisdiction to challenge administrative action.[74]

In holding the notice not "final" the court paid no heed to the compelling argument of the dissent that the company found itself in a serious dilemma: it must either accede to the EPA's interpretation of the plan, which meant installing an expensive scrubber, or it must risk penalties and a possible shutdown if its own interpretation turned out to be wrong.[75] The case was as ripe for decision as if the dispute had been over the validity of the regulation itself.[76] Thus even if the notice was not "final" agency action, there was an "actual controversy" between the parties over the interpretation of the implementation plan, and for such controversies the Declaratory Judgment Act[77] affords a remedy—provided, of course, there is jurisdiction.

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[69] 321 U.S. 414, 439, 444 (1944).

[70] It is difficult to imagine any reason why Congress might have wanted these regulations to be reviewed in state rather than in federal courts, as both the defendant and the governing law are federal. Indeed the jurisdiction of state courts over federal officers in injunctive proceedings is highly doubtful. *See, e.g.*, McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 603-05 (1821) (mandamus); Pennsylvania Turnpike Comm'n v. McGinnes, 179 F. Supp. 578, 579-80, 583 (E.D. Pa. 1959); D. Currie, Federal Courts 630-34 (2d ed. 1975).

[71] 522 F.2d 302 (3d Cir. 1975).

[72] *Id.* at 305-06.

[73] *Id.* at 309.

[74] *Id.* at 310-11.

[75] *Id.* at 318 (Adams, J., dissenting).

That the EPA "may" rather than "must" follow up a thirty-day notice with an order or complaint would be highly relevant if a plaintiff sought to compel EPA to take enforcement action, for the inevitable defense would be that the Administrator had discretion not to proceed. West Penn, however, made no such claim. Its position was that the EPA had no authority to enforce its interpretation of the plan, for West Penn was not in violation. That the EPA has discretion not to sue those who are in violation does not mean it has discretion to sue those who are not; actions against prosecutors with the usual discretion not to prosecute are common when the plaintiff alleges there is no right to prosecute at all.[78]

The court's third argument was that the APA provided no jurisdictional basis. The Supreme Court has since agreed,[79] but the jurisdictional problem has been solved by the removal of the amount requirement in actions against federal officers.[80]

One court has gone so far as to refuse to determine whether a plaintiff was in violation of an implementation plan provision after the EPA had issued an order against it.[81] In part this conclusion was erroneously based upon section 307's provision for exclusive appellate court jurisdiction to review the validity of the plan. But the court also found judicial review of orders precluded by the Act's failure to provide explicitly for review. First, the court argued, the statute represented a "strong congressional desire to protect the public health"; second, a provision for such review had been deleted from the bill by the Conference Committee "follow[ing] discussion in the Senate of the need for a simple, direct method of enforcement and the need to issue an immediate cease-and-desist order to protect the public health."[82]

The court's reasoning is unpersuasive. That public health was at stake gives us no clue as to Congress' intentions on judicial review; the leading case refusing to find preclusion of review by silence arose under a statute protecting public health.[83] The provision deleted from the earlier Senate bill did not quite authorize judicial review, since it merely stated that compliance with an order would not have "foreclose[d]" a suit to challenge the order. Arguably the detailed venue provision included for such suits indicated more than a desire to leave the matter to general law, but quite clearly the reason for the reference to review was the fear that in its absence one would have to risk penalties in order to make a challenge.[84] The omission of this provision in conference is as consistent with the conclusion that it was unnecessary, or that compliance should moot review, as with the conclusion that review was meant to be excluded. The "discussion in the Senate" preceding deletion in fact took place during a committee hearing on a different bill that said nothing about judicial review, long before any action by the Senate on either bill; while one party to the discussion argued that the EPA should be able to enter an order without prior hearing, there was no suggestion that judicial review should be barred.[85] In light of the APA's presumption of reviewability, especially after *Abbott Laboratories v. Gardner*,[86] far more evidence of intention to exclude judicial review should be necessary.

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[76] *Cf.* Abbott Laboratories v. Gardner, 387 U.S. at 152-53; National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 696 (D.C. Cir. 1971).

[77] 28 U.S.C. § 2201 (1970).

[78] *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974).

[79] Califano v. Sanders, 97 S. Ct. 980 (1977).

[80] *See* note 49 *supra*.

[81] Lloyd A. Fry Roofing Co. v. EPA, 9 ERC 1265, 1269-71 (W.D. Mo. 1976).

[82] *Id.*

[83] Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

The present law is adequate to afford a forum in both the cases just discussed, but the danger that one so seriously in need of judicial guidance can be denied it by misinterpretation of that law suggests the desirability of an amendment to make clear the power of the district courts to resolve actual controversies over the interpretation of implementation plans or other regulations under the pollution laws.[87]

D. *The Notice Requirement*

Quite a different problem of nonstatutory review was raised by *Natural Resources Defense Council, Inc. v. Train*.[88] NRDC sued to compel the Administrator to issue effluent guidelines within the deadlines of section 304 of the FWPCA. It had neglected to give the EPA the sixty-day notice required by the citizen-suit provision of section 505, but the court held jurisdiction lay under the APA: section 505 was intended to increase, not to contract judicial review, and its explicit saving clause made clear that it did not preclude actions that could otherwise be brought under other laws.[89]

The trouble with this reasoning is that it undermines the flat statutory requirement of prior notice to the EPA. It is one thing to hold that section 505 is not meant to make unreviewable actions that fall outside its purview, or to make unavailable remedies, such as damages, that it does not afford. But to hold that Congress by a general saving clause intended to allow precisely the relief authorized by section 505 to be pursued against the precise actions enumerated in that section without compliance with the conditions carefully attached by the statute is another matter. Congress evidently thought notice to the Administrator served an important purpose in affording an opportunity for administrative enforcement that might avoid the need for court action;[90] that purpose may be frustrated by the *NRDC* decision whenever an alternative jurisdictional basis can be found for the identical action that falls within section 505. The court did soften the blow by acknowledging that the failure to give notice would be held a failure to exhaust administrative remedies when there was "reason to believe that further agency consideration may resolve the dispute and obviate the need for further judicial action."[91] This approach transforms Congress' clear and flat rule into a matter of court judgment on the facts of each case, which may unnecessarily promote litigation; and there is no assurance that all courts upholding nonstatutory jurisdiction will take the same view of exhaustion.[92] I would not have held the notice provision could so easily be evaded; the statutes should be amended to assure that it may not be in the future.[93]

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[84] S. REP. NO. 1196, 91st Cong., 2d Sess. 22, 98 (1970).

[85] 2 SENATE COMM. ON PUBLIC WORKS, 93d CONG., 2D SESS., LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 1005-06 (1974).

[86] 387 U.S. 136 (1967).

[87] The Administrative Conference Committee on Judicial Review decided not to propose a recommendation to that effect, doubting its necessity and its efficiency in resolving concrete cases.

[88] 510 F.2d 692 (D.C. Cir. 1975).

[89] *Id.* at 700-01; *accord*, NRDC v. Callaway, 524 F.2d 79, 83-84 (2d Cir. 1975); Conservation Soc'y v. Secretary of Transp., 508 F.2d 927, 938-39 & n.62 (2d Cir. 1974).

II. Actions Reviewable in the Courts of Appeals

A. Adjudications

Direct appellate review of formal administrative adjudications, such as cease-and-desist orders of the Federal Trade Commission,[94] has long been standard practice: because the agency's action is to be judged by the administrative record, there is no need for a trial, and thus no need for prior resort to a district court.[95] Since enforcement under the pollution laws is essentially entrusted to the courts,[96] formal agency adjudication is not so prominent here as it is under many statutes. Decisions on formal adjudicative records are, however, required with respect to postponement of the date for compliance with an air quality implementation plan under section 110(f)[97] and suspension or revocation of certificates of motor vehicle emission compliance under section 206(b) of the CAA.[98] In both cases direct review is expressly authorized in the courts of appeals.[99]

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[90] *See* S. Rep. No. 1196, 91st Cong., 2d Sess. 37 (1970).

[91] 510 F.2d at 703.

[92] Exhaustion was not mentioned in any of the decisions cited in note 89 *supra*.

[93] The Administrative Conference is in agreement with this position. Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ C) [hereinafter cited as ACUS Recommendations 1976].

[94] 15 U.S.C. § 45 (1970).

[95] *See* Recommendations of the Administrative Conference of the United States, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ 5) [hereinafter cited as ACUS Recommendations 1975]; Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 5-6 (1975) [hereinafter cited as Currie & Goodman].

[96] 33 U.S.C. § 1319 (Supp. V 1975); 42 U.S.C. § 1857c-8 (1970). These same sections provide for administrative enforcement orders, but without requiring a hearing. Consequently, on review of such orders, a trial court hearing on adjudicative facts is likely to be required by due process. *See* Currie, *Federal Air-Quality Standards and Their Implementation*, 1976 A.B. Foundation Research J. 365, 403.

[97] 42 U.S.C. § 1857c-5(f) (1970).

[98] *Id.* § 1857f-5(b).

[99] CAA §§ 110(f), 307(b), 42 U.S.C. §§ 1857c-5(f), 1857h-5(b) (1970).

1. NPDES Permits

Direct appellate review is also authorized with respect to "the Administrator's action . . . in issuing or denying any permit" under section 402 of the FWPCA.[100] The statutory requirement that the Administrator afford an "opportunity for public hearing" before taking such action[101] appears to make this a sensible provision, for in this adjudicatory context "public hearing" would seem to contemplate decision on a trial-type record. The EPA's regulations, however, while providing both for an apparently legislative "public hearing"[102] and for an "adjudicatory" one upon proper request,[103] authorize the Administrator in reviewing the initial decision of his subordinate to decide "on the basis of the record and any other consideration he deems relevant."[104] Whether this striking provision squares any better with the statute than it does with principles of fair and orderly procedure may be doubted. If it does, it may force the reviewing court to allow a further hearing, which the court of appeals is in a poor position to provide. I suspect, however, that the occasions on which the Administrator goes outside the record will be rare enough not to impair the general principle of direct appellate review; and in any event it is the offending regulation, not the statutory review provision, that ought to be amended.

Nevertheless there is reason to suggest a reservation with respect to direct appellate review of permit actions under section 402. One recent estimate places the number of potential permit applications as high as 75,000,[105] and many may involve questions of significance only in the particular case. Permit appeals therefore may prove to fall within that exceptional class of formal adjudications for which the Administrative Conference has recommended initial district court review "in the interest of conserving the scarce and overextended resources of the Federal appellate system."[106] Delegation of permit authority to the states[107] should reduce the number of permit appeals,[108] and the scope of issues open at the permit stage is still an unresolved question.[109] It seems too early to make a final assessment of the desirability of district court review, but an amendment may be in order if permit cases begin to impose a heavy burden on the courts of appeals. In any event, the problem should be a transitory one; the flood of applications should decline to a trickle after sources now in existence receive their permits.

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[100] FWPCA § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) (Supp. V 1975).

[101] *Id.* § 402(a)(1), 33 U.S.C. § 1342(a)(1).

[102] 40 C.F.R. § 125.34 (1976). This hearing is to be held only if there is "a significant degree of public interest."

[103] *Id.* § 125.36. Such a hearing is mandatory on request of any "person . . . having an interest which may be affected."

[104] *Id.* § 125.36(n)(12).

[105] *See* NRDC v. EPA, 537 F.2d 642, 646 n.11 (2d Cir. 1976).

[106] ACUS Recommendations 1975, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ g). *See also* Currie & Goodman, *supra* note 95, at 18-19, 24-25.

[107] FWPCA § 402(b), (c), 33 U.S.C. § 1342(b), (c) (Supp. V 1975).

[108] *See* Mianus River Preservation Comm. v. Administrator, 541 F.2d 899, 906 (2d Cir. 1976); text accompanying notes 110-20 *infra*.

[109] *See, e.g.*, E.I. du Pont de Nemours & Co. v. Train, 541 F.2d 1018, 1027-28 (4th Cir. 1976), *aff'd in part and rev'd in part*, 97 S. Ct. 965 (1977).

The provision for reviewing the issuance or denial of a permit also poses a question of interpretation. While it is clear enough that state action with respect to section 402 permits is not reviewable in the courts of appeals,[110] the Administrator has authority to veto state issuance of such a permit.[111] In *Mianus River Preservation Comm. v. Administrator*,[112] the Second Circuit held his failure to exercise that authority was not "the Administrator's action . . . in issuing or denying . . . [a] permit" within section 509(b). In reaching this conclusion the court opined that "the option to take no action" appeared to be "committed to the Administrator's almost unfettered discretion," citing legislative history to indicate that the veto power should be sparingly exercised and a statutory provision authorizing its waiver without specifying on what grounds.[113] Emphasizing, moreover, that "the federal agency took no action at all," it quoted from a related district court opinion: "The mere failure to disapprove a state administrative action cannot be deemed decisionmaking by a federal body."[114] The result cannot clearly be said to embody either the conclusion that the failure to veto was insulated from review by the APA provision for actions "committed to agency discretion by law"[115] or the thesis that inaction is necessarily excluded from section 509, for it seems a cross between the two: "Such inaction, predicated upon the statute's express design, can hardly be described as 'Administrator's action . . . in issuing . . . [a] permit' . . . ."[116]

The decision was probably right, though neither theory suggested by the court is beyond argument. One may question whether the waiver provision should really be construed to permit the EPA to refuse altogether to carry out a reviewing function Congress undeniably saw fit to confer.[117] And since an explicit decision not to veto would appear to be EPA "action" for purposes of judicial review,[118] it is arguable that review under section

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[110] Mianus River Preservation Comm. v. Administrator, 541 F.2d 899, 902-06 (2d Cir. 1976).

[111] FWPCA § 402(d)(2), 33 U.S.C. § 1342(d)(2) (Supp. V 1975).

[112] 541 F.2d at 906-10.

[113] The waiver provision provides that "[t]he Administrator may, as to any permit application, waive paragraph (2) of this subsection." FWPCA § 402(d)(3), 33 U.S.C. § 1342(d)(3) (Supp. V 1975).

[114] 541 F.2d at 909, *quoting* Shell Oil Co. v. Train, 415 F. Supp. 70, 78 (N.D. Cal. 1976).

[115] 5 U.S.C. § 701(a)(2) (1970).

[116] 541 F.2d at 909.

[117] *Cf.* NRDC v. Train, 9 ERC 1425 (2d Cir. 1976), which directed institution of proceedings leading to the issuance of an air quality standard for lead despite a provision that the Administrator need do so only for those pollutants "for which . . . he plans to issue air quality criteria." CAA § 108(a)(1)(C), 42 U.S.C. § 1857c-3(a)(1)(C) (1970).

[118] *See* 5 U.S.C. §§ 551(6), (13) (1970), incorporated by reference in § 701(a)(2) of the same title with respect to judicial review: " 'agency action' includes . . . an agency . . . order," *id.* § 551(13), while " 'order' means . . . a final disposition, whether affirmative [or] negative . . . in form," *id.* § 551(b).

509 should not be evaded simply because, for identical reasons, the Agency has chosen to achieve the same result without entering an order. The failure to act at all, however, is generally dealt with separately under the provision for citizen suits in the district courts,[119] presumably because in such cases there will usually be no formal administrative record. That a formal hearing record may accompany a state agency's denial of a permit application[120] should not be decisive, as the word "action" in section 509 applies as well to other situations in which inaction would mean no record, and the citizen suit lies whether there is a record or not. Moreover, even if the Administrator has taken "action" by failing to act, he has neither "issu[ed]" nor "den[ied]" a permit, as section 509 seems to require; nor would he have done so by entering an order expressly declining to block the state's issuance of the permit. This difficulty also makes somewhat questionable the court's dictum acknowledgment, and the EPA's concession, that the court of appeals could review the Administrator's actual veto of the issuance of a state permit, though in light of the policy of section 509 such action might be held a "den[ial]." Review of the Administrator's veto authority in the district courts would present problems of its own that were not addressed in *Mianus*.

These problems of interpretation are perhaps too minor to justify congressional attention, but neither the scope of discretion in exercising the veto power, nor the availability of judicial review of that exercise, appears to have been adequately thought through. Since the EPA's action or failure to act is presumably to be based upon the state hearing record, it seems reasonable, subject to the concern expressed above with regard to permit review generally, that such review as is allowed be had in the courts of appeals.

2. *Other Adjudications*

The statutes are silent on judicial review of the issuance or denial of dredge deposit or sludge discharge permits under sections 404 and 405 of the FWPCA,[121] and of two-year waivers of hazardous pollutant requirements to enable individual sources to install controls under section 112 of the CAA.[122] Dredge permits are subject to a hearing requirement that makes them theoretically analogous, for review purposes, to permits under section 402, although they probably will be far less numerous. Sludge permits, inexplicably, are not subject to a hearing requirement, nor are section 112 waivers; in such cases, absent an EPA regulation prescribing hearings,[123] a judicial hearing is likely to be necessary on facts peculiar to the applicant, thus making the district court the better forum. It would be better to have such hearings before the expert agency itself, with review in the courts of appeals, unless the unimportance of the matter or the number of prospective appeals counsels otherwise.

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[119] FWPCA § 505, 33 U.S.C. § 1365 (Supp. V 1975).

[120] *Id.* § 402(b)(3), 33 U.S.C. § 1342(b)(3).

[121] 33 U.S.C. §§ 1344, 1345.

[122] 42 U.S.C. § 1857c-7(c)(1)(B)(ii) (1970).

[123] The regulations, 40 C.F.R. §§ 61.10-61.11 (1976), provide for decisions regarding waivers under the hazardous substances provision to be based initially upon the written submission of the applicant. If the request is to be denied, the EPA must provide the applicant with "notice of the information and findings upon which such intended denial is based" and

Direct appellate review is provided for orders in response to applications to postpone compliance with vehicle emission standards under section 202(b)(5) of the CAA.[124] Though the "public hearing" required in the latter instance has been held to be a "legislative" one,[125] in practice it seems to have produced an adequate record for direct review,[126] and the obvious importance of the determination makes avoidance of the district court desirable on efficiency grounds.

B. Rulemaking

Direct appellate review of informal rulemaking is a relatively recent innovation[127] made practicable by the increasing tendency of courts and Congress to require agencies to base regulations on materials that are before them[128] and on the recognition that a trial-type hearing may be unnecessary to establish "legislative" facts[129] even if brought out for the first time in a reviewing court.[130]

The pollution statutes are in accord with this modern trend; most of the actions subject to direct appellate review are regulations adopted without formal hearings. Not every such regulation, however, is included, and it is not always easy to determine which are. One obvious omission, already discussed,[131] is the light-duty vehicle emission standards; since they seem as appropriate for direct review as do other vehicle standards for which such review is provided, it would be proper to make them reviewable in the courts of appeals.[132] Other omissions and interpretive problems will now be addressed.

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afford the opportunity for presentation of "additional information or arguments," apparently in writing.

[124] 42 U.S.C. § 1857f-1(b)(5); *see* CAA § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970).

[125] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 630 (D.C. Cir. 1973).

[126] *See id.*

[127] *See* United Gas Pipe Line Co. v. FPC, 181 F.2d 796 (D.C. Cir. 1950), construing a provision for direct review of FPC "orders" not to include regulations because "an appellate court has no intelligible basis for decision unless a subordinate tribunal has made a record fully encompassing the issues." *Id.* at 599. But the *United Gas Pipe Line* doctrine is in decline today. Currie & Goodman, *supra* note 95, at 39-40.

[128] *E.g.*, Occupational Safety & Health Act, 29 U.S.C. § 655(f) (1970) (construed in Associated Indus. of N.Y. State, Inc. v. Department of Labor, 487 F.2d 342, 349 (2d Cir. 1973)); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 379-87 (D.C. Cir. 1973) (new source performance standards, CAA § 111, 42 U.S.C. § 1857c-6 (1970)).

[129] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT, § 7.03, at 160 (3d ed. 1972).

[130] *See* Currie & Goodman, *supra* note 95, at 39-54. This method of review, under appropriate circumstances, has been endorsed by the Administrative Conference. ACUS Recommendations 1975, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ g).

[131] *See* text accompanying notes 68-71 *supra*.

[132] The Conference has so recommended. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ E(2)).

1. *Disapproval or Decision Not to Adopt Regulations*

In *Utah International, Inc. v. EPA*[133] the Tenth Circuit held that section 307 of the CAA did not authorize direct review by the courts of appeals of the Administrator's disapproval of a state plan for the implementation of air quality standards.[134] The statute ambiguously provides for review of "action in approving" plans,[135] which could refer either to actual approval alone or to the Administrator's decision either way on the approval question. The Tenth Circuit held that section 307 incorporated the usual limitation of review to final action[136] and that rejection of a state plan under the circumstances was not final:

> [T]he effect of a disapproval order under the Clean Air Act is to reopen the administrative process . . . . [U]ntil such time as the E.P.A. promulgates its own plan, after allowing the state an opportunity to come up with a revised plan of its own, there is no final applicable [sic] order under the statute.[137]

The court added it thought it "doubtful" that the case was ripe for review under the principles of *Abbott Laboratories v. Gardner*.[138]

The decision is supported by the considerations that underlie the related doctrines of ripeness, finality, and exhaustion of administrative remedies, as well as the federal presumption against interlocutory appeals from trial courts.[139] While approval of a state plan, like the adoption of another self-executing regulation in *Abbott*, imposes obligations upon the affected polluter that place him in the dilemma of risky disobedience or costly compliance, disapproval ordinarily does not; and the controversy may be mooted in the course of remaining proceedings to determine the contents of the substitute federal plan. Ordinary principles of finality, as the Tenth Circuit has held, should be read into section 307.

This is not to say, however, that "action in approving or promulgating" plans should be held to exclude every plan disapproval. If the EPA disapproves a plan *revision* proposed by a state on its own initiative, its action will often be final: no further administrative proceedings are necessarily contemplated, and the existing plan remains in effect. Similarly, if the Administrator after a full notice-and-comment proceeding finally decides not to adopt any regulation at all, there will be an adequate record for resolving in the court of appeals any contention that he was required to do so.[140] Policy therefore counsels construing the references to "action . . . in promulgating" standards or "in approving" plans in section 307 of the

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[133] 478 F.2d 126 (10th Cir. 1973).

[134] *Id.* at 127.

[135] CAA § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970).

[136] The APA makes reviewable "final agency action" and other "agency action made reviewable by statute." 5 U.S.C. § 704 (1970).

[137] 478 F.2d at 127-28.

[138] 387 U.S. 136 (1967), *cited in* 478 F.2d at 128.

[139] *See generally* 28 U.S.C. §§ 1291, 1292 (1970).

[140] He may have had discretion to adopt no standard at all, but the court of appeals can decide the extent of that discretion as well as the district court.

CAA and in section 509 of the FWPCA to include final action either way on the question of approval. The alternative of total unreviewability is not lightly to be inferred, and district court review is unpalatable; there is no reason the outcome before the Administrator should determine the forum for judicial review. The proper interpretation of these provisions could be facilitated by amending them to afford review of "final action . . . with respect to approval or promulgation" of standards or plans. Nevertheless, the courts have so far done well with the existing language despite its ambiguity.

2. *Implementation Plan Extensions*

Although the CAA provides for direct appellate review of decisions respecting postponement of the date by which an individual source must comply with an implementation plan (section 110 (f)), it says nothing about review of the decision whether or not to extend the date for compliance with the ambient standard itself under section 110(e). Nevertheless, the courts of appeals, without discussion, have entertained challenges both to the grant[141] and to the denial[142] of section 110(e) extensions in the course of reviewing implementation plans under section 307. This practice seems clearly correct. There is no reason to think Congress intended this decision to be either unreviewable or reviewable in the district courts. Since the deadline determines the length of time in which the ambient standard is to be implemented, and since the extension decision is made at the time the Administrator passes upon the plan, a state request for extension of the date is realistically a part of its implementation plan, and its approval is therefore subject to review under section 307. Conversely, when the Administrator refuses the extension and promulgates a plan of his own, the refusal can be challenged as an attack upon the compliance schedules in the federal plan.

3. *Emission Standards*

Another question about the coverage of section 307 was raised in *United States v. Big Chief, Inc.*[143] Charged with the criminal violation of a federal regulation requiring the wetting of asbestos materials prior to building demolition, Big Chief attempted to challenge the validity of the regulation in federal district court. Section 307, however, provides for exclusive jurisdiction in the courts of appeals to review any "emission standard" under section 112, the hazardous pollutant provision, under which the demolition rule had been promulgated. Though it ultimately upheld the regulation on the merits, the court made clear it thought its jurisdiction was precluded by section 307: to limit direct appellate review to numerical standards "would frustrate the plain legislative purpose behind the review provision."[144] The thrust of the review provision, the court correctly intimated, was to provide review of any regulations adopted purportedly under the emission standard authority of section 112.[145]

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[141] NRDC v. EPA, 494 F.2d 519, 524-25 (2d Cir. 1974).

[142] Texas v. EPA, 499 F.2d 289, 318 (5th Cir. 1974).

[143] 7 ERC 1840 (E.D. La. 1975).

4. *Effluent Guidelines*

Section 301(b) of the FWPCA provides that "there shall be achieved" by specified types of sources "effluent limitations" requiring application by 1977 of "the best practicable control technology currently available," and by 1983 of "the best available technology economically achievable," in either case "as defined" or "as determined" by the Administrator "pursuant to section 304(b)." The latter section, in turn, directs the Administrator, "for the purpose of adopting or revising effluent limitations under this Act," to adopt "regulations, providing guidelines for effluent limitations" that describe the effluents to be obtained upon use of the best practicable and best available technology. The Administrator adopted effluent guidelines for corn wet milling plants. In *CPC International, Inc. v. Train*,[146] a large corn processor challenged the guidelines directly in the Court of Appeals for the Eighth Circuit. Section 509 says nothing about judicial review of guidelines promulgated under section 304, but the EPA took the position that they were within section 509's provision for appellate review of "effluent limitation[s] . . . under § 301(b)."[147] The court dismissed the suit for lack of jurisdiction.[148]

Section 301, the court concluded, did not authorize the promulgation of effluent limitations by regulation. By forbidding issuance of a discharge permit "outside the guidelines," section 402(d)(2) was said to demonstrate that the permit-issuing authority is to follow the guidelines promulgated under section 304(b), and is not to refer to independent regulations promulgated under section 301.[149] Legislative history was mustered: an EPA administrator had testified that "effluent limitations required by Section 301 would be established and applied to all point sources . . . by means of the permits issued under Title IV."[150] In short, the effluent limitations to be established under section 301 were those in individual permits granted under section 402, not the section 304 guidelines upon which those permit limitations were to be based.

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[144] *Id.* at 1841.

[145] *Id.* The Sixth Circuit, rejecting the feeble contention that § 307 applied only to procedural attacks on the promulgation of a regulation, has held the same regulation not reviewable in a criminal proceeding. United States v. Adamo Wrecking Co., 545 F.2d 1, 4-6 (6th Cir. 1976). On the issue raised in *Big Chief* it said only, "[W]e see nothing inconsistent with the purposes of this statute in the Administrator's promulgaton of a 'work practice' as a condition of an emission standard which, absent fulfillment of the work practice conditions, otherwise prohibits any emission . . . ." *Id.* at 6 n.2.

[146] 515 F.2d 1032 (8th Cir. 1975).

[147] *Id.* at 1037.

[148] *Id.* at 1052; *accord*, CPC Int'l, Inc. v. Train, 540 F.2d 1329, 1331 & n.1 (8th Cir. 1976) (dictum).

[149] CPC Int'l, Inc. v. Train, 515 F.2d 1032, 1038-39 (8th Cir. 1975).

[150] *Id.* at 1039.

This is a possible interpretation of the statute, but a singularly unappealing one. The court's distinction between section 301 limitations and section 304 guidelines is highly artificial; the court conceded that the sole purpose of the latter was to define the former. The Senate Report, which the court quoted, was quite explicit: "[T]hese [section 304] guidelines would define the effluent limitations required by the first and second phases of the program established under section 301."[151] What seems to have motivated CPC in arguing that section 304 guidelines were not reviewable as section 301 limitations was the substantive argument that the limitations embodied in permits are to vary according to individual circumstances. The jurisdictional and uniformity questions, however, are separable; one court has held the EPA may promulgate section 301 limitations by regulation so long as they allow flexibility at the permit stage.[152]

Despite the Eighth Circuit's disclaimer, its interpretation seems to make the explicit provision for review of the approval or promulgation of "effluent limitation[s] . . . under section 301" almost without independent significance. If the only such limitations are those contained in individual permits, they are all reviewable anyway under the section 307 provision respecting the issuance or denial of any permit. The *CPC* court argued that there was no redundancy because "[t]he reference to § 301 is necessary if the Administrator's action under § 301(c), modifying the application of the 1983 requirements to certain point sources, is to be subject to judicial review."[153] Apparently such determinations are to be made outside the permit process, when that process has been delegated to the state. Yet this cannot be the sole office of section 509's reference to section 301, since "the legislative history shows quite clearly that section 301(c), which was only added during the House-Senate Conference, did not even exist at the time [the review provision] was originally drafted."[154] Moreover, to limit the reference to section 301(c) determinations would, as the Supreme Court has since said, produce the anomalous situation in which the courts of appeals would review individual actions while regulations of general applicability were reviewed in the district courts.[155]

In policy terms the *CPC* holding can only be described as a minor disaster. Nowhere does the court begin to intimate why Congress might have wanted to omit the section 304 guidelines from review by the courts of appeals. The same questions concededly will be subject to review there when the guidelines are applied to individual permits. There is no reason to believe there will be any greater difficulty in establishing the relevant facts than in reviewing other regultions promulgated after the identical notice-and-comment procedure. Any suggestion that the guidelines might not be ripe for review until applied to the individual in his permit was torpedoed by the court's flat dictum that the guidelines were reviewable in the district courts under general law.[156]

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[151] S. Rep. No. 414, 92d Cong., 1st Sess. 51 (1971).

[152] American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975).

[153] 515 F.2d at 1043.

[154] American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1037 (3d Cir. 1975).

Section 301(f) also bans the discharge of certain biological warfare agents and radioactive waste, 33 U.S.C. § 1311(f) (Supp. V 1975), and the court in *CPC* read it to outlaw all discharges without permits. 515 F.2d at 1042-43. While these provisions might be considered effluent limitations, ***but see*** American Iron & Steel Inst. v. EPA, 526 F.2d at 1038 ("section 301(f) is not an 'effluent limitation,' but rather a flat prohibition on all such discharges"), they are not limitations "approved" or "promulgated" by the Administrator; they are prescribed by the statute itself. 33 U.S.C. § 1311(f) (Supp. V 1975).

[155] E.I. du Pont de Nemours & Co. v. Train, 97 S. Ct. 965, 975 (1977).

The *CPC* case itself most graphically illustrates the inconsistency and waste of the review system it created. As is its practice, the EPA had proposed and adopted simultaneously four sets of effluent requirements for corn wet milling plants: new source performance standards under section 306(b), pretreatment standards for discharges into municipal sewers under section 307(c), and guidelines for best practicable and best available technology under section 304. CPC challenged all four; the court reviewed the first two on the merits while declining jurisdiction over the challenge to the existing source regulations.[157] It is not as if the several standards were unrelated. They all affect the same processes of the same industry; the court that masters the industrial facts well enough to pass on one standard has a head start in passing on the others. Indeed, the corn milling standard for new plants, which the court did review, was identical to the 1983 guideline for existing plants, which it refused to review. Moreover, the new source standard was premised upon use of the technology the Administrator had prescribed in his 1977 existing plant guidelines, plus deep-bed filtration. In passing upon the new source standard, the court found it necessary to determine that the technology required by the 1977 guidelines it refused to review was in fact adequate to meet the guideline. This is not to say that the court fully resolved the validity of the guidelines on the merits, for it might still have been open to argument that technology available for new plants could not practicably be incorporated into existing ones. But the overlap of issues was enormous, and the waste of effort in requiring an entirely new challenge to the guidelines in the district court was unforgivable.

The *CPC* court's refusal to consider section 304 guidelines to be section 301 effluent limitations is not compelled by the statutory language or history, is not supported by any conceivable statutory policy, and makes a total shambles of the review process. Five other courts of appeals have since disagreed with *CPC*'s jurisdictional ruling,[158] a sixth court has disagreed with its reasoning,[159] and the House has passed a bill to make it explicit that section 304 guidelines are reviewable in the courts of appeals.[160] The Supreme Court has recently addressed this question. It has held that the EPA has authority to promulgate effluent limitations by regulation under section 301, so that review in the courts of appeals follows as a matter of course.[161] While this decision allows the EPA to assure direct appellate review by using the section 301 label, it leaves open the possible denial of such review if the Agency should choose to adopt section 304 guidelines without that label, as apparently it means to do whenever time permits.[162] There is thus still a need to provide for appellate review of such guidelines.

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[156] 515 F.2d at 1034. *See also* 540 F.2d at 1331 n.1.

[157] The existing source regulations in fact have since been reviewed by a district court. Grain Processing Corp. v. Train, 407 F. Supp. 96 (S.D. Iowa 1976).

[158] American Frozen Food Inst. v. Train, 539 F.2d 107 (D.C. Cir. 1976); Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976); E.I. du Pont de Nemours & Co. v. Train, 528 F.2d 1136 (4th Cir. 1975), *aff'd*, 97 S. Ct. 965 (1977); American Petroleum Inst. v. EPA, 526 F.2d 1343 (10th Cir. 1975); American Meat Inst. v. EPA, 526 F.2d 442 (7th Cir. 1975).

[159] American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975) upheld on the merits EPA's authority to promulgate effluent limitations under § 301 by regulation without

5. *Credit for Polluted Intake*

In reviewing effluent guidelines for the iron and steel industry the Third Circuit in *American Iron & Steel Institute v. EPA*[163] (*AISI I*) declared that "any individual point source should be entitled to an adjustment in an effluent limitation . . . if it can show that its inability to meet the limitation is attributable to significant amounts of pollutants in the intake water."[164] The EPA adopted regulations so providing, and the Third Circuit refused to review them in *American Iron & Steel Institute v. EPA*[165] (*AISI II*): "We agree with the EPA's analysis that the Net-Gross Regulations do no more than prescribe the policy and procedures to be followed in connection with applications for permits."[166] Because these regulations "[did] not in themselves restrict quantities, rates, or concentrations"[167] of pollutants, they were not "effluent limitations" within section 509(b) as the statute defines them;[168] because they "[did] not specify the factors to be considered . . . in determining control measures to be utilized by individual point sources,"[169] they were not even "effluent guidelines" under section 304. The court went on to cast doubt even on the reviewability of the regulations in the district court, even though that question was not before it: ". . . without the original gross limitations before us, the modifications, if any, which may be

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discussing jurisdiction. The Tenth Circuit in *American Petroleum Inst.* avoided deciding whether § 301 gave the Administrator power to adopt limitations by regulation, finding it sufficient for jurisdictional purposes that he had purported to act under § 301.

[160] S. 2710, 94th Cong., 2d Sess., § 18 (House version), 122 CONG. REC. H5285, H5288 (daily ed. June 3, 1976). EPA, justly complaining that the *CPC* decision results in both "bifurcated" review and "at least a one-year delay," has asked Congress to overrule the decision. The Natural Resources Defense Council agrees. *See* 6 ENVIR. REP. (BNA) 1692 (1976). *See also* ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ E(1)(b)).

[161] E.I. du Pont de Nemours & Co. v. Train, 97 S. Ct. 965, 974 (1977).

[162] *Id.* at 972-73, 975-76.

[163] 526 F.2d 1027 (3d Cir. 1975).

[164] *Id.* at 1056.

[165] 543 F.2d 521 (3d Cir. 1976).

[166] *Id.* at 526.

[167] *Id.* at 527.

[168] "The term 'effluent limitation' means any restriction . . . on quantities, rates, and concentrations of . . . constituents which are discharged from point sources . . . ." 33 U.S.C. § 1362(11) (Supp. V 1975).

[169] 543 F.2d at 529.

effected by the operation of the Net-Gross Regulations are both incalculable and unintelligible."[170]

The court's concern for the abstract nature of the controversy is exaggerated. The question of background credit is a readily comprehensible one that seems resolvable on the basis of the statute itself, without reference to the particular figures in any individual effluent guideline;[171] and that is how the EPA treated it in adopting a general regulation. Yet the other half of the Supreme Court's test for the ripeness of administrative action[172] appears not to be met: the "Net-Gross" regulations have no impact on the discharger until effluent guidelines applicable to him have also been adopted or a permit sought.[173] The iron and steel guidelines, remanded to the EPA earlier by the Third Circuit, had not been reissued when the background regulations were challenged.[174]

Once the guidelines reappear, however, it would be unfortunate to make appellate reviewability of the background regulations depend upon whether the guidelines expressly incorporate them, as the opinion suggests. The Third Circuit itself passed on the question of background credit when it reviewed the original iron and steel guidelines,[175] and other courts have properly reviewed the net-gross regulations in determining the validity of effluent guidelines for other industries.[176] Regardless of the form of words used, the intake credit rules help to define the discharger's obligation under the effluent limitation itself and thus can readily be held to be, in effect, part of the various effluent limitations. Moreover, contrary to what the court said, those rules seem to do precisely what section 304 guidelines are supposed to do: they specify a factor—the presence of untreatable pollutants in the intake water—"to be taken into account in determining the control measures and practices to be applicable to point sources."[177] It follows from my argument regarding the *CPC* case that they should be held reviewable in the court of appeals. In any event the statute too easily lends itself to the court's construction. It should be amended to provide for direct review of all final action respecting regulations *relating to* effluent limitations under section 301.[178]

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[170] *Id.* at 527-28.

[171] *See* Currie, *Rulemaking Under the Illinois Pollution Law*, 42 U. CHI. L. REV. 457, 496 & n.157 (1975).

[172] *See* Abbott Laboratories v. Gardner, 387 U.S. at 148-49.

[173] *See* text accompanying notes 133-39 *supra*; *cf.* Utah Int'l, Inc. v. EPA, 478 F.2d 126, 128 (10th Cir. 1973).

[174] American Iron & Steel Inst. v. EPA, 543 F.2d at 524 & n.6.

[175] American Iron & Steel Inst. v. EPA, 526 F.2d at 1056.

[176] Appalachian Power Co. v. Train, 545 F.2d 1351, 1361 (4th Cir. 1976); American Petroleum Inst. v. EPA, 540 F.2d 1023, 1034 (10th Cir. 1976); Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 633 (2d Cir. 1976).

[177] 33 U.S.C. § 1314(b)(1)(B) (Supp. V 1975).

[178] The second *AISI* decision came down too late for consideration by the Committee on Judicial Review; consequently no proposed recommendation on the subject was presented to the Conference.

6. Water Quality Standards

Conspicuously missing from the review provisions of section 509(b) is the Administrator's approval or promulgation of water quality standards under section 303.[179] Section 301, however, requires among other things compliance with any "limitation . . . required to implement any applicable water quality standard established pursuant to this [Act]."[180] My analysis of the *CPC* case raises the question whether the reference to water quality standards in section 301 renders those standards subject also to judicial review under section 509 as "effluent limitation[s] or other limitation[s] under section [301]."[181] The Second Circuit has held, correctly I think, that it does not.[182] The text immediately implies a distinction between water quality standards themselves and "limitation[s] . . . required to implement" them. Even if the standards are "other limitations" within section 509, it is only the regulations implementing them that must be met under section 301.

The Second Circuit described the omission of water quality standards from section 509 as "odd";[183] it should be rectified.[184] As the court noted in seeking possible reasons for the omission, such standards differ from effluent guidelines in that they "apply only in a single state and have less direct effect on individual enterprises."[185] The latter, however, is equally true of air quality standards and the former of plans for their implementation; both are reviewable in the courts of appeals. Moreover, neither fact seems of great force in determining whether review should be in a district rather than circuit court. That the standard is local argues for review in the various circuits as opposed to the District of Columbia, and its indirect impact argues that review in any forum may be premature. Section 303 does not specify what procedure either a state or the Administrator is to follow with regard to water quality standards; it is possible therefore that the record on review may be somewhat less adequate than in the case of air quality standards, which are the result of notice-and-comment procedure.[186] On the other hand, the silence of the FWPCA with respect to procedure seems more likely to be taken to mean that the notice-and-comment requirements of the APA[187] apply;[188] the disputed decisions under the CAA that rejected this conclusion[189] were based largely upon the express provision for a state hearing on such plans[190] that would have made a federal proceeding duplicative. Futhermore, the relevant facts are legislative; they can if necessary be brought out in the court of appeals without a trial-type hearing.

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[179] 33 U.S.C. § 1369(b) (Supp. V 1975).

[180] *Id.* § 1311(b)(1)(C).

[181] *Id.* § 1369(b)(1)(E).

[182] Bethlehem Steel Corp. v. EPA, 538 F.2d 513, 516 (2d Cir. 1976).

[183] *Id.* at 518.

[184] The Conference has so recommended. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ E(1)(a)).

[185] 538 F.2d at 517.

[186] CAA § 109(a), 42 U.S.C. § 1857c-4(a) (1970).

[187] 5 U.S.C. § 553 (1970).

[188] *See* 5 U.S.C. § 559 (1970): "Subsequent statute may not be held to supersede or modify this subchapter [containing the notice and comment requirements] . . . except to the extent that it does so expressly." *See* Buckeye Power, Inc. v. EPA, 481 F.2d 162, 170-71 (6th Cir. 1973), holding § 553 applicable to EPA approval of implementation plans.

Section 303(e) of the FWPCA provides for state submission of a "continuous planning process," to be approved by the EPA if it "will result in plans" providing, among other things, for "adequate implementation . . . for revised or new water quality standards."[191] If the Administrator were to pass upon the implementation plans themselves, the effluent standards they contained would, under the reasoning I have applied to the *CPC* case, be reviewable under section 509 as effluent limitations approved by the Administrator under section 301. The apparent gap between the "planning process" that the EPA is to approve and the actual implementation plan the state is thereafter to adopt, however, introduces a complication: the limitations in the state plan evidently will not themselves be approved by the EPA and thus will fall outside section 509. Moreover, because no federal action is involved, the implication may be that there is no review in the district courts either,[192] although the possibility of federal court enforcement proceedings under section 301 suggests the contrary. Whether the limitations are necessary or sufficient to achieve the water quality standards will presumably be reviewable in the appropriate state or federal court when they are incorporated into a permit.[193] The principle problem here is attributable to the substantive division of labor between state and federal agencies, not to the provisions for judicial review.

7. *Other Omissions*

Section 211 of the CAA authorizes the Administrator by regulation to require registration and to "control" or to "prohibit" the manufacture or sale of any motor vehicle fuel or fuel additive.[194] Although section 307 authorizes review by courts of appeals of "any control or prohibition" respecting fuels, the Sixth Circuit has construed it to include registration requirements as well, essentially because direct review of such regulations would be sound policy.[195] That something ought to be the law does not make it so; the statute should be amended to authorize direct review of registration regulations.

The water statute contains a number of additional authorizations for generally applicable regulations for which no judicial review provision is made. Section 312, for example, authorizes regulations respecting the discharge of domestic wastes from vessels; section 311 for defining "hazardous substances," prescribing equipment to prevent their discharge, determining what quantities of such materials are harmful, setting per unit dollar amounts for discharge penalities, and establishing inspection standards; section 403 for defining "degradation" of the oceans;[196] section 404 for the deposit of dredged material;[197] and section 405 for the disposal of sewage sludge.[198] All of these seem as susceptible to direct appellate review as do those listed in section 509, and they ought to be included.[199]

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[189] Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973); Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973). *Contra*, Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973).

[190] CAA § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1970).

[191] 33 U.S.C. § 1313(e) (Supp. V 1975).

[192] *See* text accompanying notes 55-68 *supra* (state permits).

[193] However, § 301 also requires the discharger to meet any more stringent limitations established under state law, whether or not necessary to meet the water quality standards.

[194] 42 U.S.C. § 1857f-6(c) (1970).

[195] Lubrizol Corp. v. Train, 547 F.2d 310 (6th Cir. 1976).

Section 312 of the FWPCA further authorizes states to ban all boat sewage discharges upon the Administrator's finding that adequate facilities for removal and treatment are reasonably available.[200] Nothing is said about either administrative procedure or judicial review, except that the state is to file an "application" and the Administrator is to act within ninety days. Even if no administrative hearing is held and the Administrator relies on factual material outside the application—such as the Agency's own inspection—it may be unnecessary to hold an evidentiary hearing upon judicial review because of the arguably "legislative" nature of the facts in issue. Thus, especially since related regulations under the same section should be made reviewable directly in the courts of appeals, a plausible case can be made for direct appellate review of the adequate facilities determination as well. There is an obvious analogy to approval of a state permit program under section 402, which the courts of appeals may review.[201] However, the absence of any record requirement—unless remedied by EPA regulation—and the apparent utility of cross-examination of government inspectors if relied upon to resolve narrow factual questions suggest caution. At the least, provision should be made for remand if it proves necessary to conduct a hearing. The Administrative Conference has recommended district court review of informal adjudications except for actions that "typically involve issues of law or of broad social or economic impact," even if a trial will be rare;[202] while the action in question is probably rulemaking, the fact that the determination may be no more significant than whether there should be two pumpout stations rather than one in a single harbor argues in any event against burdening the courts of appeals with these cases.[203]

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[196] FWPCA §§ 311-312, 403, 33 U.S.C. §§ 1321-1322, 1343 (Supp. V 1975).

[197] *Id.* § 404, 33 U.S.C. § 1344.

[198] *Id.* § 405, 33 U.S.C. § 1345.

[199] With regard to boat sewage and hazardous substances, which were considered by the Committee on Judicial Review, the Conference has so recommended. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶¶ E(1)(c), (d)).

[200] FWPCA § 312(f)(3), 33 U.S.C. § 1322(f)(3) (Supp. V 1975).

[201] *Id.* §§ 402, 509(b), 33 U.S.C. §§ 1342, 1369(b).

[202] ACUS Recommendations 1975, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ 6(b)(i)).

[203] The Conference at EPA's suggestion has recommended direct appellate review. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ E(1)(d)).

Finally, nothing is said of judicial review of approval or disapproval of state permit programs for sludge disposal under the FWPCA section 405,[204] or of determinations that specified areas are off limits for the deposit of dredgings under section 404.[205] The former is analogous to the approval of state NPDES programs under section 402, which are made reviewable in the courts of appeals; only the probable greater importance of NPDES seems a reasonable justification for the distinction. Presumably the classification of an area as off limits for dredgings is to be done by regulation rather than by adjudication, since it is implicit that all potential depositors would be affected. Nevertheless, since such a decision would probably be of essentially local impact, a good case can be made for retaining district court review.

III. The Citizen-Suit Provisions

A. *Undermining the Courts of Appeals*

The plaintiff in *Sierra Club v. Ruckelshaus*[206] argued that the EPA Administrator was required to disapprove state proposed implementation plans that did not prohibit deterioration of areas cleaner than required by air quality standards. The plaintiff in *Anaconda Co. v. Ruckelshaus*[207] argued that the Administrator was required to issue an environmental impact statement and hold an adjudicatory hearing before promulgating a plan provision applying to the plaintiff's plant. Each of these cases was filed in a federal district court, and each court accepted jurisdiction under section 304 of the CAA, which authorizes citizen suits to require the Administrator to perform "any act or duty under this Act which is not discretionary." The district court in *Sierra Club* reasoned that if, as alleged, the CAA required the Administrator to insist upon nondegradation clauses, his failure to do so was a failure to perform a duty as to which the Act left him no discretion, meeting the requirements of section 304.[208]

If the only section of the Act requiring construction in the *Sierra Club* case had been section 304, something might have been said for such literal interpretation, even though the terminology of the section is scarcely the usual means of expressing a general principle of judicial review. But one must not read section 304 in isolation. Since every nonconstitutional challenge to an implementation plan can be characterized as arguing that the Administrator has failed to do what the statute requires, the reasoning of the district court in *Sierra Club* means that every such attack upon approval or promulgation of a plan may be brought in the district courts, although section 307 expressly says it shall be brought "only" in the courts of appeals. The only way to make sense of the statutory scheme is to hold, contrary to

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[204] FWPCA § 405, 33 U.S.C. § 1345 (Supp. V 1975).

[205] *Id.* § 404, 33 U.S.C. § 1344.

[206] 344 F. Supp. 253, 254 (D.D.C. 1972), *aff'd mem.*, 4 ERC 1205 (D.C. Cir. 1972), *aff'd by an equally divided court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973).

[207] 352 F. Supp. 697, 702 (D. Colo. 1972), *rev'd*, 482 F.2d 1301, 1307 (10th Cir. 1973).

[208] 344 F. Supp. at 254.

Sierra Club, that section 307's explicit provision for exclusive appellate court jurisdiction limits what otherwise might have been the jurisdiction of the district courts under section 304.[209]

The district court in *Anaconda* echoed the literalism of *Sierra Club*, but it came up with an additional argument. The federal plan in *Anaconda* had only been proposed, not adopted. Therefore, said the court, section 307 could not provide the exclusive remedy because it provided no remedy at all: "[N]o present review is available to plaintiff under Section 307 of the Act because there has been no promulgation of an implementation plan . . . ."[210] This argument was equally applicable to *Sierra Club*, where the Administrator had not yet acted upon plans that the states had submitted.

That the federal standard in *Anaconda* could not have been reviewed under section 307 before its adoption is almost certainly true. The courts have generally held challenges to merely proposed regulations unripe,[211] and the Tenth Circuit has soundly held that section 307 applies only to final EPA action.[212] Far from supporting the *Anaconda* argument that mere proposal of a federal plan is reviewable in a district court, however, the unavailability of review under section 307 compellingly argues to the contrary. The reason that merely proposed regulations or disapprovals of state plans are not reviewable in the courts of appeals is that they are not reviewable at all. Allowing pre-promulgation review in the district court both contradicts the policy against resolving premature questions and frustrates Congress' clear intent to avoid delay by routing questions regarding the legality of implementation plans directly to the courts of appeals.[213] Thus, it should come as no surprise that the Tenth Circuit reversed in *Anaconda* and ordered a dismissal for lack of jurisdiction under section 304:

> Congress has made clear in [section 307] . . . that the courts of appeals are to review the promulgation or implementation of a clean air plan

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[209] *Accord*, Luneburg & Roselle, *Judicial Review Under the Clean Air Act Amendments of 1970*, 15 B.C. Indus. & Com. L. Rev. 667, 691 n.145 (1974). The same result should be reached under the FWPCA despite the absence from § 509 of the word "only"; district-court review would contradict the policy of expeditious review evident in placing jurisdiction in the courts of appeals.

[210] 352 F. Supp. at 707.

[211] *E.g.*, Lever Bros. Co. v. FTC, 325 F. Supp. 371, 373 (D. Me. 1971); *cf*. Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164-66 (1967) (holding unripe an attack on an adopted regulation that the Court said had no immediate effect upon the plaintiffs).

[212] Utah Int'l, Inc. v. EPA, 478 F.2d 126, 127 (10th Cir. 1973).

[213] If, as argued in *Anaconda*, there is a real danger of irreparable harm in waiting until promulgation to seek review, that argument might be better directed to creating access to the court of appeals under § 307 in order to respect the policy of direct review. However, one presupposition of direct review is that there will be no need for a trial, which the appellate court is ill-equipped to conduct, and the court can hardly base its decision on what was before the Administrator if the latter has not completed his proceedings. This problem is of less significance when, as is often the case in such proceedings, the issues are of law or of legislative fact that may be debated in briefs without trial; and it may be that a claim of irreparable harm prior to promulgation is always insufficient to overcome countervailing policies in light of the possibility of staying the final regulation pending judicial review. In any event, § 304 should not be used to circumvent the principle of direct review absent a most convincing showing that immediate district court review is imperative.

> . . . . A further reason for denying jurisdiction in this case is that the cause was not ripe for injunctive relief . . . . Utah International, Inc. v. Environmental Protection Agency . . . .[214]

Essentially the same considerations apply to the *Sierra Club* case.[215]

In short, allegations that the Administrator has failed to take action required by statute should not be permitted to circumvent the plain statutory command that judicial review of decisions respecting implementation plans and certain other regulations is to be in the courts of appeals, or the plausible inference that review prior to final agency action is generally premature. To hammer home a point that should already be obvious, Congress might insert within the citizen-suit provisions an explicit exception for matters that are or will become reviewable in the courts of appeals.[216]

B. *Omissions from Adopted Regulations*

The paradigm citizen suit, as indicated by the language of sections 304 and 505, is a horse of quite another color. A typical example is *City of Riverside v. EPA*,[217] in which it was argued and held that the Administrator had failed to promulgate an implementation plan for Los Angeles within the time limits prescribed by statute.[218] Such a case cannot be based on materials on which the Administrator has passed, since he has done nothing; consequently there may have to be a trial, which would make direct appellate review impracticable. Moreover, to wait until eventual promulgation of the plan would utterly fail to protect the plaintiff's position. Thus, in light of the provisions for review by courts of appeals, the citizen suit should not be viewed as an avenue of judicial review of past or future administrative action. Rather, it properly provides a remedy for the failure of the Administrator to act at all.

Yet there will be cases in which, as observed by by one court of appeals, "the line between action and inaction . . . disappears."[219] In *National Resources Defense Council, Inc. v. EPA*[220] the Administrator had promulgated a standard limiting the lead content of gasoline in order to protect catalytic exhaust devices. The plaintiff argued he was required to adopt additional standards to protect the public health from direct effects of automotive lead emissions. On the one hand, as the court pointed out, NRDC's complaint was that the regulation adopted did not go far enough; on the other, it was that the EPA had failed to adopt any health-related regulation at all.

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[214] 482 F.2d 1301, 1304 (1973).

[215] Tactical considerations such as the desirability of avoiding multiple litigation and the availability of attorneys' fees may well influence a party's decision to seek review in a district court. But the questions of fees and of centralized review are analytically separable from the question of review in the district court or court of appeals; they should be dealt with on their own merits, and should not be permitted to distort the present issue.

[216] ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ B(1)).

[217] 4 ERC 1728 (C.D. Cal. 1972).

[218] *Id.* at 1731.

[219] NRDC v. EPA, 512 F.2d 1351, 1356 (D.C. Cir. 1975).

[220] 512 F.2d 1351 (D.C. Cir. 1975).

The court concluded, with some misgivings, that the case had been properly brought under section 307, suggesting that the EPA had "discretion" with respect to the adoption of health standards, but that the exercise of that discretion in light of the available information was reviewable in the court of appeals.

The suggestion that section 307 affords the appropriate remedy for questions of factual arbitrariness seems to turn the apparent policy underlying the division of authority between courts of appeals and district courts on its head, for if the sole task is application of the statutory language there will be less likelihood of need for the trial that only the district court is equipped to conduct. Moreover, the narrow scope of review suggested by the court for section 304 risks making questions of abuse of discretion totally unreviewable when the Administrator has done nothing at all. This is not a necessary reading of the statutory limitation to duties that are "not discretionary." Such a limitation has always confined the writ of mandamus; yet the better view, confirmed by the Supreme Court, is that the writ lies to determine whether an officer has acted beyond the scope of his admitted discretion.[221]

A better approach would build upon the basis for district court jurisdiction under section 304: when there has been a rulemaking proceeding and the petitioner is dissatisfied with the result, the court can weigh the objection against the material that was before the Administrator, and the proper forum is the court of appeals. When there has been no proceeding, there is no administrative record and, consequently, greater likelihood of need for a trial; therefore, the district court is the appropriate forum. This distinction accords well with the common-sense meanings of sections 304 and 307, which provide, respectively, for failure to act and for review of administrative action.

Thus, the court was right, albeit for different reasons, in ruling that the omission of a health-related lead standard was a matter for the court of appeals under section 307. The initial proposal had contained such a provision, which was presumably the subject of comments during the rulemaking proceeding; these comments would form a basis for judging the legality of the Administrator's decision to drop the proposal. On the other hand, if health standards had not been a subject of the proceeding, section 304 would have provided the sole remedy.[222]

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[221] Work v. United States *ex rel.* Rives, 267 U.S. 175, 177 (1925); *see* W. Gellhorn & C. Byse, Administrative Law 151-53 (6th ed. 1974). There are still courts that refuse mandamus under 28 U.S.C. § 1361 (1970) for abuse of discretion. *E.g.*, Ortego v. Weinberger, 516 F.2d 1005, 1011 (5th Cir. 1975). The court in Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 662-63 (D.C. Cir. 1975), saying that § 304 was meant to reach only matters on which there is no discretion at all, relied on the insertion of the words "not discretionary" in conference and the committee's explanation that the provision had been "limited" to "mandatory functions." But the committee may simply have been concerned to make doubly certain that the courts did not substitute their judgment for the Administrator's when he had acted within the scope of his discretion. The court gave no reason why Congress might have wished to preserve a distinction admittedly "abstract and conceptual." *Id.* at 662.

[222] *Cf.* City of Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975). The Seventh Circuit held that a district court had no jurisdiction under § 304 to review the Administrator's

C. The Failure to Revise Regulations

A further question of the interplay between sections 304 and 307 was posed in *Oljato Chapter of Navajo Tribe v. Train*,[223] a district court action under section 304 to compel the Adminstrator to revise the new source performance standards for coal-fired power plants.[224] Rather surprisingly, in view of the absence of a record and of the language of section 307, the court held that section provided the sole avenue of redress. First, the court drew once again on the distinction it had made concerning the scope of review in *NRDC v. EPA*: section 111's provision that the Administrator "may" revise performance standards gives him discretion that takes the matter outside section 304; abuse of that discretion is reviewable, if at all, under the broader power of section 307. Moreover, the latter section was intended "to provide a legal mechanism—and an exclusive one—to assure that standards were revised whenever necessary."[225] Here the court quoted the Senate Report to show that the provision allowing direct review more than thirty days after promulgation of a standard "on grounds arising after such 30th day" was meant to allow review of an abuse of discretion in refusing to revise a standard on the basis of new information:

> It is clear that new information will be developed and that such information may dictate a revision or modification of any promulgated standard or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any promulgated standard, regulation, or approved or promulgated implementation plan after the date of promulgation whenever it is alleged that significant new information has become available.[226]

This is a most unexpected conclusion. The immediately attractive answer to a section 304 complaint seeking a revision is simply that the statutory term "may" imposes no duty to revise the standards and that therefore, on the merits, the plaintiff has no cause of action. However, it is

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decisions to make indirect source regulations inapplicable to sources whose construction was commenced before January 1, 1975, over the objection that he had failed "to promulgate regulations with respect to such facilities": "[A] provision defining the scope of regulations and their effective date is as much a part of the regulations as the substantive parts." *Id.* at 689. The court dismissed, for failure to give the required notice, a § 304 claim that the Administrator had unlawfully omitted several pollutants from the nondegradation regulations and held that this claim could not be made under § 307, saying that the allegation was of failure to act. Because the inclusion of these pollutants had been extensively considered in the rulemaking proceeding, this latter ruling was in error. A significant prematurity problem, *cf.* American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975), was avoided because the Administrator explicitly incorporated the nondeterioration rules into existing implementation plans. Consequently, the District of Columbia Circuit has properly entertained under § 307 the argument that the Administrator erred in approving a plan not limiting degradation by automotive pollutants. Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976).

[223] 515 F.2d 654 (D.C. Cir. 1975).

[224] Specifically, the plaintiffs asked that EPA require the use of flue gas desulfurization devices even when low-sulfur coal was burned.

[225] 515 F.2d at 660; *accord*, Union Elec. Co. v. EPA, 515 F.2d 206 (8th Cir. 1975) (dictum), *aff'd*, 427 U.S. 246 (1976). As the court recognized in *Oljato*, this holding made it unnecessary to decide whether, apart from the exclusivity provision, § 304 applied.

[226] S. REP. NO. 1196, 91st Cong., 2d Sess. 41-42 (1970).

not easy to visualize how "grounds arising after" the review deadline can be relevant to the validity of the original regulation unless, as the court held in *Oljato*, the regulation must be revised as technology improves. However awkward the phrasing, this is not such an implausible rendering of the statutory language as to justify ignoring such a clear statement of legislative intent. Thus I conclude the court was probably right in *Oljato*, but the statute is in dire need of amendment; a judicial review provision ought not be made to bear the weight of an implicit duty of revision that contradicts the apparently plain words of another section of the same statute.

Given the court's decision that there is a duty to revise standards when new information comes along, it seems peculiar that the statute places review of the failure to do so in the court of appeals. There was no substantial administrative record in *Oljato* on which to base review; as the court recognized, it was faced with the prospect of developing the facts on its own, a task for which a district court seems eminently better equipped. One way out would have been to hold that the facts in question were "legislative" and thus could be established through Brandeis briefs without trial.[227] The court found a different way, requiring under its "inherent powers to enforce our interest in informed decision-making" that "any new information thought to justify revision" be first presented to the Administrator as a prerequisite to review in the court of appeals.[228]

Assuming the court was correct about the duty to revise, this resolution has much to recommend it in policy. Since the initial decision whether or not to revise is the Administrator's, it makes sense that factual material bearing on that decision be first presented to him rather than to either a district court or court of appeals. The court can more properly be said to be reviewing his decision under those circumstances than if it is asked to rule that the Administrator should have revised the standard on the basis of material that was not formally before him. But I see no warrant in the statute for requiring proceedings before the Administrator on a request for revision; if section 307 provides review of a failure to revise, it seems to contemplate documentary establishment of the relevant legislative facts in the court of appeals. I think the court has taken liberties with the statute in order to achieve a more sensible scheme.

D. Mandamus in the Courts of Appeals

As the cases just discussed should indicate, the existence in each statute of two distinct provisions for judicial scrutiny of the EPA in different courts has already created considerable uncertainty and litigation over the proper forum. Judge Wright is highly critical of the current state of the law:

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[227] *See* Currie & Goodman, *supra* note 95, at 48-49.

[228] *Accord*, Union Elec. Co. v. EPA, 515 F.2d 206 (8th Cir. 1975) (dictum), *aff'd*, 427 U.S. 246 (1976).

> [T]he courts have been of . . . little help to litigants attempting to discern the parameters of Sections 304 and 307. While the courts play jurisdictional badminton with these provisions, batting one case back to the District Court under Section 304 while taking another identical one under Section 307, litigants should not be denied substantial rights because of uncertainty created by courts and Congress.[229]

The judicial and legislative reforms suggested above may alleviate, but cannot completely avoid, this uncertainty. At best, the risk of finding oneself in the wrong forum when it is too late to file in the right one seems substantial enough to call for a transfer provision like that applicable to the Court of Claims.[230] Uncertainty and threshold litigation would be reduced further if the statute provided for appellate court determination (except in enforcement cases) of all questions relating to regulations whose validity is reviewable there. Furthermore, the courts of appeals, because of their exclusive jurisdiction over final regulations, are likely to be more familiar with the subject matter of these challenges than are the district courts. Besides, since review of such a regulation adopted as a result of a court order will be in the appellate court, district court jurisdiction over the initial mandamus action effectively splits a single case between two courts.[231]

At first glance the cases properly brought in the district court under the quasi-mandamus provisions belong there because of the absence of a record; on reflection, however, this may be a largely theoretical problem. Whether a standard must be promulgated will often depend solely upon statutory construction,[232] and the ease of documenting the fact that no standard has been adopted is likely to avoid the need for a hearing on the facts. If the duty of the Administrator turns on such issues as whether a substance is a danger to public health,[233] the facts are likely to be "legislative" and thus susceptible to proof by Brandeis briefs without trial. While policy may make it desirable, even though not necessary, to develop such technical matters through oral testimony unsuitable for an appellate court, the *Oljato* opinion seems correct, as a policy matter, in stating that the delegation of authority to the Administrator to decide whether a standard should be adopted or revised strongly suggests that the place to develop factual materials, whether through trial or written submission, is before the Agency itself.[234] The language of the same court in assuming jurisdiction over an order resulting from informal adjudication is singularly apt here: "[T]he facts in issue lie peculiarly within the special competence of the Secretary. The district court could do no more than remand to the Secretary, as we do here."[235]

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[229] NRDC v. EPA, 512 F.2d 1351, 1361 (D.C. Cir. 1975) (dissenting in part).

[230] *See* 28 U.S.C. § 1506 (1970):

> If a case within the exclusive jurisdiction of the district courts is filed in the Court of Claims, the Court of Claims shall, if it be in the interest of justice, transfer such case to any district court in which it could have been brought at the time such case is filed, where the case shall proceed as if it had been filed in the district court on the date it was filed in the Court of Claims.

See also ACUS Recommendations 1975, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ 8).

[231] A question might even arise whether the proper avenue for review of such a regulation is a contempt proceeding in the district court under some circumstances, which is contrary to the statutory design.

[232] *See, e.g.*, NRDC v. Train, 545 F.2d 320 (2d Cir. 1976) (duty to adopt air quality criteria for lead); NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1974) (deadline for adopting effluent guidelines under § 304 of the FWPCA).

[233] *See, e.g.*, NRDC v. EPA, 512 F.2d 1351 (D.C. Cir. 1975) (lead standards for fuel); *cf.* Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975) (revision of new source standard to reflect improved technology).

On the basis of these considerations, the Administrative Conference has recommended that the courts of appeals be given authority to resolve preliminary questions respecting standards whose validity is reviewable in the courts of appeals, and to deal with the *Oljato* problem by remanding when necessary for an appropriate agency or district court proceeding.[236]

IV. The Time Limits on Review

It is common for one charged with violating a regulation to argue in defense that the regulation is invalid. Such a practice has considerable potential for delay, for the upshot may be that the agency must start all over on a new regulation after the time has come to meet the original. To avoid this risk, Congress, which was in a great hurry to see the country cleaned up, required that attacks on the validity of listed types of regulations be made by petition in the court of appeals within thirty days (in the case of air) or ninety days (in the case of water) after promulgation. To make this point abundantly clear, the statutes add that action reviewable by petition in the courts of appeals "shall not be subject to judicial review in civil or criminal proceedings for enforcement."[237] A later review in the court of appeals, however, is allowed if based "solely on grounds arising after" the statutory period.[238]

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[234] Oljato Chapter of Navajo Tribe v. Train, 515 F.2d at 666-67.

[235] EDF v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970).

[236] ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ B(2)). This recommendation appears to be consistent with the principles enunciated in ACUS Recommendations 1975, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ 6), with respect to review of informal agency actions: The proceedings in question seem likely to involve important issues that will often be taken in any event to the courts of appeals; the issues seem likely in most cases to be resolvable without evidentiary trial; and the issues are likely to be closely related to others already directly reviewable in the appellate courts.

The phrasing of the 1976 recommendation posed some difficulty. It could not very well include "all questions relating to" such standards, since it was not intended to place enforcement proceedings in the courts of appeals. Examples intended to be included are the failure to promulgate a standard, the failure to revise it, and the refusal to postpone the date for submission of an implementation plan for secondary air quality standards. The drafting is not precise and may exclude other examples. Perhaps it would be best to refer all questions of nondiscretionary duties respecting such standards to the courts of appeals.

If a hearing is necessary, I have argued that the agency is generally the best place to hold it. This may not always be the case, however, as, for example, if the question is the adequacy of the agency's excuse for failure to meet a statutory deadline. Thus, the allowance exists in the recommendation for remand to a district court when an agency hearing would be inappropriate.

[237] FWPCA § 509(b), 33 U.S.C. § 1369(b) (Supp. V 1975); CAA § 307(b), 42 U.S.C. § 1857h-5(b) (1970).

A. Interpretation

The scope of these limitations on judicial review was at issue in *Getty Oil Co. v. Ruckelshaus*.[239] A provision of Delaware's implementation plan limited the use of high sulfur fuels in certain parts of the state after January 1, 1972. Delmarva Power and Light Co., owner of the only plant subject to the regulation, failed to comply by the prescribed date, and the EPA issued an order directing it to comply by May 1, 1972. Getty, which supplied high sulfur fuel to Delmarva in return for electricity, sued to have the order set aside. The Administrator argued that the action was barred by section 307 of the CAA because the issues could have been raised in an attack upon the approval of the plan within thirty days after promulgation.[240]

Getty raised four distinct grounds for attacking the EPA's order. The Third Circuit held all four were cognizable by a section 307 petition and were therefore barred. As to three of these grounds, the court was plainly mistaken; as to the fourth, its holding was subject to serious doubts.

Getty's first argument was that the National Environmental Policy Act[241] required the Administrator to draw up an environmental impact statement before issuing a compliance order.[242] A contention that NEPA required an impact statement in connection with the approval of the implementation plan itself would clearly have been cognizable under,[243] and hence barred by, section 307. Getty's position, however, was that a statement was required not upon plan approval but upon issuance of the later enforcement order. It seems abundantly clear that no such argument would have been appropriate in a section 307 proceeding. Not only is that section limited to challenges to the plan itself, but at the time when such a review could have been sought there was no order to challenge.

Getty's next argument was that no federal compliance order should be issued until final resolution of a pending state variance proceeding.[244] This argument too has nothing to do with the approval of the implementation plan; it relates solely to the question of prerequisites for issuing a federal order. It thus could not have been made under section 307 and cannot be forbidden by that section.

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[238] *Id. See* text accompanying notes 223-28 *supra* for consideration of the meaning of the new-grounds provision.

[239] 342 F. Supp. 1006 (D. Del. 1972), *remanded*, 467 F.2d 349 (3d Cir. 1972).

[240] Since Getty had taken the initiative by suing in advance of any effort at judicial enforcement, technically its challenge could not be barred by the preclusion of judicial review "in civil or criminal proceedings for enforcement." Section 307, however, explicitly excludes all untimely challenges by providing that review of the standards may be had "only" by filing a timely petition in the court of appeals. The word "only" does not appear in the comparable § 509 of the FWPCA; yet exclusivity is plainly intended, for the policy of requiring early review of regulations is infringed equally by a late challenge in any form.

[241] 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1970).

[242] *Id.* § 4332(2)(c).

[243] *See* Appalachian Power Co. v. EPA, 477 F.2d 495, 504-07 (4th Cir. 1973).

[244] 467 F.2d 349, 355 (3d Cir. 1972).

Getty's third argument was that the compliance date set in the enforcement order was not a "reasonable" one in light of the seriousness of the violation and good faith efforts at compliance,[245] as required by section 113.[246] The government argued that, since an earlier compliance date had been set by the implementation plan, the time to attack the date was during a section 307 proceeding to review the regulation.[247] There is a certain appeal to this position; to the extent that the EPA, in issuing the later order, is bound by the date already set in the regulation, repetition of the regulation date cannot obscure the fact that, in substance, the attack is on the date set by the regulation. Getty, however, contended that the provision of a reasonable time for compliance under section 113 was not merely a formality, but a chance for a substantive second look on the basis of individual hardship—in short, an informal variance provision.[248] Getty's argument was thus quite distinct from that which could have been made under section 307: while Getty could have argued in a section 307 petition that the regulation time was too short, it could not have argued there that the factors listed in section 113 required a variance from a valid regulation.

The district court, to its credit, resolved each of these first three issues on the merits.[249] The court of appeals, without serious effort at explanation, simply characterized the complaint as effectively attacking the validity of the regulation.[250]

Finally, admitting that the only way to attack an implementation plan on its face was under section 307, Getty nevertheless argued that section 307 did not authorize, and therefore did not forbid by later defense or suit, an attack on the regulation as applied to an individual case. Both the district court and the court of appeals rejected this distinction.[251] The statute certainly does not say it is limited to facial challenges; general principles of separability and standing often mean that the normal attack upon a statute or regulation is as applied rather than across the board, and late challenges present the same problems of delay in achieving clean air whether facial or as applied.[252]

However, the considerations that make direct appellate review of regulations practicable[253] are inapplicable when the attack is based upon facts peculiar to the individual company. Suppose, for example, that a company subject to a regulation conceded to be generally valid argues that it cannot comply because there is no room to install the necessary controls at its crowded plant, or that its financial condition is so precarious that it is unreasonable to apply the regulation to it, or that the air is so clean in its vicinity that compliance with a strict emission standard would be a waste of money. These claims all depend upon facts that, in traditional terms, would be considered adjudicative rather than legislative, and on which standard learning would suggest there is a right to a trial-type hearing[254] that appellate courts are ill-equipped to provide. Moreover, the rulemaking record before the Administrator is likely to focus upon general questions concerning the desirability of the regulation as a whole; it would be most cumbersome to try every individual variance case during the course of the rulemaking proceeding. Finally, even if there is a record of individual facts, it will not be the result of the trial-type procedure that the Constitution often requires for adjudicative facts, for the pollution statutes do not provide for such a hearing in the adoption of regulations. There is no provision in these statutes, as there is in the Hobbs Act,[255] for transfer to a district court for hearing. Furthermore, remand to the Agency for further evidence is authorized only when the decision being reviewed is required by statute to be based on the record of a trial-type hearing; this is not true of any regulations relevant here.

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[245] *Id.* at 355. *See also* 342 F. Supp. 1006, 1019 (D. Del. 1972).

[246] 42 U.S.C. § 1857c-8(a)(4) (1970).

[247] *See* 467 F.2d 349, 355-60 (3d Cir. 1972).

[248] *Id.* at 358. *See also* 342 F. Supp. 1006, 1020 (D. Del. 1972).

[249] *Cf.* West Penn Power Co. v. Train, 522 F.2d 302 (3d Cir. 1975), which held correctly that a dispute over whether the plaintiff was in compliance with the applicable implementation plan was not barred by § 307. *Id.* at 316-17.

[250] 467 F.2d 349, 355, 359 (3d Cir. 1972).

[251] *See id.* at 355-56; 342 F. Supp. 1006, 1015 (D. Del. 1972).

[252] *Cf.* Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921), which held that a provision for appeal to the Supreme Court when state statutes were upheld by state courts included cases in which a statute was attacked as applied. *Id.* at 288-89.

[253] *See* text accompanying notes 127-30 *supra*.

The inadequacy of the rulemaking procedure for establishing adjudicative facts has led one court to hold, contrary to *Getty*, that attacks on regulations as applied cannot be brought under or precluded by section 307.[256] There is much to be said for this position. If possible, the statute should be construed to avoid a result either unconstitutional or impracticable. It is hard to believe Congress meant to require appellate courts to conduct trials or to encumber rulemaking proceedings with innumerable individual claims of individual hardship, and it made no provision for separate quasi-judicial hearings. Moreover, the Senate Committee expressly said that a regulated person "would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to him alone."[257] But the entire question of where to file an attack on a regulation as applied may be based upon a misconception of the substantive law. The very purpose of a regulation is to avoid the necessity for determining the appropriate requirements on a case-by-case basis; that a particular company may have special problems in meeting the standard will most likely be held to be no excuse.[258] This conclusion is made the more compelling under the federal air and water pollution statutes by the conspicuous absence of the broad variance provisions that are the common means of excusing compliance with pollution laws on the basis of individual hardship; to hold a regulation invalid as applied to individual facts would effectively grant the variance that Congress has refused to authorize.[259]

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[254] *See generally* Londoner v. Denver, 210 U.S. 373, 379 (1908).

[255] 28 U.S.C. § 2347 (1970).

[256] Buckeye Power, Inc. v. EPA, 481 F.2d 162, 173 (6th Cir. 1973).

[257] S. Rep. No. 1196, 91st Cong., 2d Sess. 41 (1970). Luneburg & Roselle, *Judicial Review Under the Clean Air Amendments of 1970*, 15 B.C. Indus. & Com. L. Rev. 667-79 (1974), would construe this remark to refer to attacks on enforcement orders, which necessarily apply only to the complaining party. However, the antecedent for "such review" appears to be review of "standards, rules and regulations." S. Rep. No. 1196, 91st Cong., 2d Sess. 40 (1970).

[258] *See, e.g.*, Heinz v. Bowles, 149 F.2d 277, 281 (Emer. Ct. App. 1945), which interpreted a statute requiring maximum prices to be "generally fair and equitable": "[I]f the maximum prices enabled most of the nonprocessing slaughterers to operate profitably, the regulation

B. Constitutional and Policy Questions

A similar provision limiting the time for judicial review of regulations under wartime price control legislation was upheld against due process objections by the Supreme Court in *Yakus v. United States*[260] on the ground that it afforded a reasonable opportunity to challenge the regulations "in view of the urgency and exigencies of wartime price regulation,"[261] which were detailed at some length. In view of this decision it is not surprising that the lower courts have so far upheld the time limits of the pollution laws, without much discussion.[262]

Yet the harshness of such a measure is manifest. Not everyone who will ultimately be affected by a regulation will even find out about it as soon as it is adopted, especially if, as one court has questionably held in reliance on the literal terms of the statute, the time begins to run before publication of the action in the Federal Register.[263] Some who do find out will not immedately recognize that it affects them, or that it will be burdensome to comply with, or that there are grounds for attacking it. The problem is compounded by the fact that the impact of an air quality standard upon the individual may be impossible to determine until after adoption of the plan for its implementation, by which time the deadline will long since have passed. Indeed the constitutional ripeness of an attack on an unimplemented air quality standard may be in doubt, since the standard does not compel anyone to do anything and its ultimate impact is so uncertain.[264] The statute even appears to make invalidity unavailable as a defense to persons who went into the affected business, moved into the affected area, or indeed were born after the thirty-day or ninety-day period. Perhaps most serious, the statute places the burden of instituting litigation upon the citizen, which is likely (and one suspects intended) to discourage litigation over the validity of the regulations. To test the *Yakus* principle one may hypothesize a statutory requirement that all constitutional challenges to federal or state statutes must be made by instituting actions within thirty

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would not be rendered invalid by the fact that an occasional marginal producer in the group could not stay in business under the established ceilings." *See also* American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975).

[259] *See* Currie & Goodman, *supra* note 95, at 51-52.

[260] 321 U.S. 414, 434-37 (1944).

[261] *Id.* at 435.

[262] Peabody Coal Co. v. Train, 518 F.2d 940, 943 (6th Cir. 1975); Granite City Steel Co. v. EPA, 501 F.2d 925, 926 (7th Cir. 1974); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 357-58 (3d Cir. 1972). In support of this conclusion see Luneburg & Roselle, *Judicial Review Under the Clean Air Amendments of 1970*, 15 B.C. INDUS. & COM. L. REV. 682-83 (1974).

[263] Peabody Coal Co. v. Train, 518 F.2d 940, 942-43 (6th Cir. 1975).

[264] *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

days after their enactment. One suspects the Court might not be so happy with a wholesale requirement of early review and would begin limiting *Yakus* to extreme wartime emergencies, or to "merely" economic matters such as prices.

Three remedies of increasing impact may be suggested. Most modestly, thirty days appears to be a particularly short time in which to require the decision to challenge a regulation; the Conference recommends that the two statutes be made consistent at sixty days.[265] More significantly, I would urge the courts, regardless of the time period chosen, to take care not to cut off review in cases in which there was no reasonable prior opportunity for judicial determination of the challenger's claim. Perhaps, to avoid the constitutional question, they could accomplish this by a creative construction of the provision respecting grounds "arising" after the thirtieth or ninetieth day, although the language is refractory and although the explicit purpose of this provision was to require revision in light of changed circumstances.[266] Perhaps it could be done, as one court has suggested, by importation of general principles equitably tolling limitation statutes.[267] Alternatively, it should be held, as implied in *Yakus*, that to impose sanctions upon one who has never had a fair opportunity to challenge the regulation under which he is charged is to deprive him of property without due process of law.[268] The statutes should be amended to make clear that later attacks may be made by those with no opportunity to mount a timely challenge.[269]

I would further recommend, in view of the likelihood that the early review requirements may trap the unwary, that they be expeditiously repealed. It seems unduly harsh, and out of line with modern views as represented in the Federal Rules of Civil Procedure, to deprive people of substantial rights—perhaps to shut down a plant worth millions of dollars—even for negligent failure to foresee the need to seek preenforcement review. Abolition of the limits would also avoid time consuming threshold litigation over whether the failure to seek timely review was justifiable. Further, the time limits may actually increase the number of challenges filed, since affected persons may feel impelled to sue to protect against enforcement that may never take place. It seems significant that Congress saw no need to forbid review at the enforcement stage in the highly comparable areas of occupational safety and health[270] and control of toxic substances,[271] and that after two years' experience the prohibition on defending at the enforcement stage was abandoned even in the admittedly extraordinary context of wartime price regulation.[272] I see no comparable emergency in the present pollution context; if in certain rare situations involving highly toxic contaminants such an emergency may appear, a time limit restricted to such emergency cases would serve the need. Accordingly the Administrative Conference, over the EPA's opposition, has recommended that the invalidity of a regulation be a permissible defense in an enforcement proceeding.[273]

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[265] ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ D(2)). H.R. 10498, 94th Cong., 2d Sess., § 305(c)(3) (1976), as passed by the House in 1976, would extend the air deadline to 60 days.

[266] *See* text accompanying notes 223-28 *supra*.

[267] Peabody Coal Co. v. Train, 518 F.2d 940, 942 (6th Cir. 1975) (dictum).

[268] That the congressional authority over federal-court jurisdiction cannot be so exercised as to deny constitutionally guaranteed rights I consider established by United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); *accord*, Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948). For further materials on this much-debated issue, see D. CURRIE, FEDERAL COURTS 132-52 (2d ed. 1975).

[269] The Conference is in agreement with this position. *See* ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ D(3)).

[270] 29 U.S.C. § 655(f) (1970); *see* S. REP. NO. 1282, 91st Cong., 2d Sess. 8 (1970).

C. Augmenting the Rulemaking Record

A related problem is presented by the provisions of H.R. 10498,[274] passed by the House in 1976, which would limit the review of a court reviewing an air pollution regulation to the record compiled in the Agency's rulemaking proceeding and generally to objections raised before the Agency. The latter limitation, but not the former, would be inapplicable upon a showing that it was "impracticable to raise such objection within such time" or that the grounds for objection are new, if the objection is "of central importance to the outcome of the rule." Commendably, in the event the new objection may be made, it is to be made in the first instance before the Agency. These amendments would further the sound policy that courts should review what the EPA has done, not make initial determinations of their own on matters within the experience of the Agency. Like the time limits on judicial review, however, they may deprive the unwary litigant of the opportunity to show that a regulation is invalid. The allowance for making a late objection when a timely one was impracticable should probably be extended to additions to the record[275] to avoid penalizing those who have not even been negligent; the integrity of statutory restrictions on rulemaking and the unfairness of denying a reasonable opportunity to assert one's rights outweigh the need for expedition. The truly careless litigant, however, may be in a somewhat less favorable position with regard to the right to bring forward new objections or new factual material than with regard to the right to seek delayed judicial review. For new matter, properly handled, requires in every case a burdensome reopening of the rulemaking proceeding, while tardy judicial review on the basis of what was before the Agency does so only if the regulation is found to be invalid. Moreover, the hardship to the potential litigant, while it may be substantial in a particular case, will often be less severe when he is merely limited to what was done before the Agency than when he is forbidden to sue at all. On balance, I think it is probably desirable to exclude tardy objections and factual material that could practicably have been presented in the rulemaking proceeding. Without these limitations, either Agency expertise will be circumvented or the rulemaking process will never be completed.[276]

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[271] Toxic Substances Control Act, Pub. L. No. 94-469, § 19(a)(1)(A), 90 Stat. 2039 (1976) (to be codified at 15 U.S.C. § 2618).

[272] Act of June 30, 1944, ch. 325, tit. II, § 107, 58 Stat. 639.

[273] ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ D(1)). Permitting review in enforcement proceedings would permit regulations to be challenged in the district courts, and I have indicated my strong preference for review in the courts of appeals. But the reason for the preference is the waste of time involved in requiring a separate and unnecessary district court proceeding. When an enforcement action is filed, there will generally be factual questions concerning the issue of violation that require district court consideration in any event; for that court to determine the validity of the regulation at the same time will not necessitate a separate proceeding.

Review at the enforcement stage would also permit decentralized review of regulations now subject to exclusive review in the District of Columbia Circuit. As will appear below, I would favor decentralized review of all regulations. The Conference, which did not, nevertheless evidently thought the policies favoring centralization should yield to the injustice of preventing tardy review. If necessary the two policies could be reconciled, at some litigation cost, by providing for certification of validity questions in enforcement cases to the D.C. Circuit. *Cf.* Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (Supp. V 1975); DeRieux v. The Five Smiths, Inc., 499 F.2d 1321 (Temp. Emer. Ct. App. 1974).

An improved variance procedure, which I would favor, would not avoid the time limit problem. No administrative hearing is called for to resolve facial attacks on the regulations, and if such a procedure were provided, my problem would remain: Should the challenger be precluded from invoking it after the expiration of 30 (or 90) days?

[274] H.R. 10498, 94th Cong., 2d Sess., § 305(a)(7)(A), (B) (1976).

[275] *See* Toxic Substances Control Act, Pub. L. No. 94-469, § 19(b), 90 Stat. 2040

V. WHICH COURT OF APPEALS?

A. *Centralized Review of National Standards*

Under the CAA, review of some administrative actions is had in the Court of Appeals for the District of Columbia Circuit, and review of others in what is with something less than total clarity described as the "appropriate" circuit. The Senate Report was quite explicit about why the distinction was made:

> Because many of these administrative actions are national in scope and require even and consistent national application, the provision specifies that any review of such actions shall be in the United States Court of Appeals for the District of Columbia. For review of the approval or promulgation of implementation plans which run only to one air quality control region, the section places jurisdiction in the U.S. Court of Appeals for the Circuit in which the affected air quality control region, or portion thereof, is located.[277]

Thus the principle is clear: matters of local significance are to be reviewed locally, while matters on which national uniformity is desirable are to be reviewed only in the District of Columbia. A glance at the matters the committee placed on each side of this line suggests a basic rationality to the division. Implementation plans are submitted by individual states and

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(1976) ("reasonable grounds for . . . failure to make such submissions and presentations in the proceeding before the Administrator").

[276] A proposed recommendation to this effect was deleted by the Committee on Judicial Review, not on the merits, but because it was thought to relate to the procedures for raising late objections rather than to judicial review. Efforts on the Conference floor to require that materials or objections brought forward for the first time in enforcement proceedings be first passed on by the agency were defeated, though no one spoke in opposition. The *Oljato* decision, *see* text accompanying notes 223-28 *supra*, suggests the courts will find ways of accomplishing this goal without specific authorization.

[277] S. REP. NO. 1196, 91st Cong., 2d Sess. 41 (1970). The bill as it then stood, like the final act, employed the term "appropriate" circuit. *See id.* at 125.

may differ from state to state; the statute in authorizing such diversity has subordinated any interest in uniformity. On the other hand, national ambient air quality standards set at levels necessary to protect the public health and welfare[278] and national emission standards set according to available or practicable technology[279] are likely to be nationally uniform. Thus the lone timely petition to date attacking an ambient air quality standard was filed in the District of Columbia Circuit,[280] and challenges to allegedly too stringent provisions in Maryland, Virginia, and West Virginia implementation plans approved by the EPA were filed in the Fourth Circuit, which includes those states.[281]

The FWPCA, in contrast, makes no provision for centralized review of regulations of nationwide impact. Even nationally applicable performance standards for new sources, for example, are reviewable under that Act in the circuit in which the petitioner "resides or transacts such business."[282] There is no apparent reason why centralized review is more appropriate for such cases when the polluted medium is air than when it is water; the statutes are simply inconsistent. It would seem appropriate for Congress to decide one way or the other. My own preference, as I have indicated elsewhere,[283] is against vesting exclusive jurisdiction in a single reviewing court. While centralization facilitates the development of expertise and speeds final resolution of issues without the necessity for Supreme Court intervention, it also deprives us of the benefit of diverse views on difficult legal questions, gives enormous power to a single inferior tribunal, inconveniences distant litigants to some degree, and creates undesirable pressures on the process of appointing judges.[284]

B. The "Appropriate" Circuit

Not every case fits the pattern envisioned by the Senate Committee. Arguably, for example, an especially stringent air quality standard could be set to protect a particular national park.[285] Similarly, in response to a request for postponement the Administrator promulgated 1975 vehicle emission standards that were more stringent for California than for the rest of the nation.[286] Conversely, that not every question respecting an implementation plan is of purely local significance has already spawned court decisions raising serious issues not only of statutory policy but of statutory construction as well.

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[278] CAA § 109(b)(1), (2), 42 U.S.C. § 1857c-4(b)(1), (2) (1970).

[279] *Id.* § 111(a)(1), 42 U.S.C. § 1857c-6(a)(1).

[280] Kennecott Copper Corp. v. EPA, 462 F.2d 846, 846-47 (D.C. Cir. 1972).

[281] *See* Appalachian Power Co. v. EPA, 477 F.2d 495, 499 (4th Cir. 1973).

[282] FWPCA § 509(b), 33 U.S.C. § 1369(b)(1) (Supp. V 1975).

[283] *See generally* Currie & Goodman, *supra* note 95.

[284] The Conference, by a divided vote, recommends centralized review of national standards under both statutes. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ A(1)). The pointed language of the Supreme Court in resolving an inter-circuit conflict over the power of the EPA to prescribe effluent limitations by regulation, suggests that the Court itself may favor decentralized review:

> This case exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task, as well as having underscored the reasonableness of the agency view.

E.I. du Pont de Nemours & Co. v. Train, 97 S. Ct. 965, 978 n.26 (1977).

[285] An appropriate example is found in the express provision of the Illinois Environmental Protection Act, wherein substantive regulations "may make different provisions as required by circumstances for different contaminant sources and for different geographical areas." ILL. REV. STAT., ch. 111½, § 1027(a) (1976). This authority—to tailor the rule to the

On May 31, 1972, the Administrator announced his decision regarding the approval or disapproval of a number of state implementation plans.[287] The Natural Resources Defense Council (NRDC) challenged the Administrator's action on several grounds: that he had unlawfully extended the statutorily prescribed time[288] for filing plans to achieve compliance with the primary air quality standards; that in extending the date for compliance with those standards he had failed to follow prescribed statutory procedures;[289] and that he had approved plans that did not contain adequate measures to assure that future growth would not cause violations of the air quality standards.[290]

Since NRDC was attacking the Administrator's "action in approving or promulgating any implementation plan," section 307 tells us review should be sought in the "appropriate" circuit; and the Senate Report, quoted above, suggests that "appropriate" is shorthand for "the Circuit in which the affected air quality control region . . . is located." This analysis would mean that, since many state plans were being attacked on identical grounds, review would have had to be sought in eleven courts at once. To protect itself,[291] NRDC filed all eleven petitions, but to avoid multiple litigation it asked that all cases be transferred to the District of Columbia Circuit, which it alleged to be the "appropriate" circuit under section 307 because the Administrator, in taking the challenged actions, had "articulated the administrative policy positions which were applied nationally and uniformly."[292]

Five courts of appeals accepted this argument and transferred the cases; the other five stayed proceedings pending the outcome in the District of Columbia.[293] Only the First Circuit wrote an opinion, and it approved the transfer,[294] concluding that "appropriate" was not a synonym

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need—should be held implicit in the federal statutes, since no intention appears to require EPA to ignore distinctions relevant to statutory standards. *See* Currie, *Federal Air-Quality Standards and Their Implementation*, 1976 AM. B. FOUNDATION RESEARCH J. 365, 368-69. Especially stringent water-quality standards for high-quality recreational waters are common at the state level. *E.g.*, Ill. PCB Regs., ch. 3, Rule 206 (Lake Michigan).

[286] *See* 38 Fed. Reg. 10,317, 10,318 (1973).

[287] 37 Fed. Reg. 10,842 (1972).

[288] CAA § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970).

[289] *Id.*, § 110(e), 42 U.S.C. § 1857c-5(e) (1970).

[290] *Id.*, § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B).

[291] CAA § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970), requires challenges to EPA approval of implementation plans to filed within 30 days.

[292] *See* NRDC v. EPA, 465 F.2d 492, 493 (1st Cir. 1972) (quoting from the petitioners' brief).

[293] *See* 3 ENVT'L L. REP. (ELI) 10,013 (1973).

[294] NRDC v. EPA, 465 F.2d 492 (1972).

for "local." First, said the court, when Congress intended to require local review under the Clean Air Act it specifically said so: the same statute provides for review of a decision postponing the date for individual compliance with a state implementation plan in the court of appeals "for the circuit which includes such State."[295] Nor, the court said, did the Senate Report require a contrary conclusion:

> The Senate Report implies a Congressional concern for a geographic approach to review only where particularistic attention is given to each plan devised for one air quality control region, and not where the automatic application of standard, nation-wide guidelines to all plans simultaneously preordains wholesale approvals or extensions.[296]

Having thus interpreted "appropriate" to allow a "flexible approach" to determining the most suitable forum on the facts of the case, the First Circuit then held that the issue should be decided in a single proceeding in the District of Columbia:

> Whatever words are used to describe the Administrator's actions on the three issues presented, we fail to understand how his rationale relates specifically to each individual state plan. The legal issues raised by petitioners in the First Circuit seem to be identical with those raised in every other circuit. The parties are the same. There do not appear to be factual questions unique to each circuit. We must also consider that litigation in several circuits, with possible inconsistent and delayed results on the merits, can only serve to frustrate the strong Congressional interest in improving the environment as evidenced by the Clean Air Act. Additionally, we do not feel that judicial manpower is so abundant so as to permit several circuits to solve identical complex legal and factual issues in the present case. We note that petitioners first filed in the United States Court of Appeals for the District of Columbia Circuit. That is where the Environmental Protection Agency has its headquarters. That is where the appropriate files are kept and where the regulations are announced. In light of all these factors we are led to conclude that the D.C. Circuit is "the appropriate circuit" to hear petitioner's claims.[297]

Transfer, the First Circuit then held, was authorized if not required by 28 U.S.C. § 2112(a), which mandates transfer to the court in which the first proceeding was filed when "proceedings have been instituted in two or more courts of appeals with respect to the same [administrative] order."[298]

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[295] CAA § 110(f)(2)(B), 42 U.S.C. § 1857c-5(f)(2)(B) (1970).

[296] 465 F.2d at 494.

[297] *Id.* at 495.

[298] It is not altogether clear that the First Circuit's decision that the District of Columbia was the "appropriate" forum to entertain an attack upon all implementation plan approvals was a requisite to transfer under § 2112(a). The court opined that any requirement that the transferee court be one in which the petition was properly filed "might be thought of as" satisfied by the holding that the District was the "appropriate" forum. It also expressed "doubts," however, that there was any such requirement: Since the first petition had been filed in the D.C. Circuit, "we are granted express authority to transfer this case to the D.C. Circuit"—apparently even if venue was improper there. Eastern Air Lines, Inc. v. CAB, 354 F.2d 507, 510-11 (D.C. Cir. 1965), so holds. Yet, though the statute, unlike the district court transfer provision in 28 U.S.C. § 1404(a) (1970), contains no express limitation requiring transfer to a court in which the proceeding "might have been brought," *see* Hoffman v. Blaski, 363 U.S. 335 (1960), Congress could scarcely have intended to frustrate applicable venue limitations by permitting a litigant to bootstrap himself into an inappropriate forum simply by

The District of Columbia Circuit, accepting jurisdiction of the entire case, agreed with the reasoning of the First Circuit and added that requiring review in the circuit including the state whose plan is attacked would have further "anomalous" results:

> The Administrator has informed us that implementation plans in several metropolitan areas cover jurisdictions falling within several circuits. In our own metropolitan area of the District of Columbia and the surrounding Virginia and Maryland suburbs, for example, adoption of the Administrator's narrow interpretation of the statute would require review of the Administrator's approval of the D.C. metropolitan area implementation plans to take place in both our own court and the Court of Appeals for the Fourth Circuit. We doubt that Congress intended such a result, especially in light of the indication elsewhere in the Act of a strong congressional concern for coordinated decision-making with respect to metropolitan areas crossing over several jurisdictions.[299]

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filing there first and then requesting transfer from a proper forum in which an identical petition is later filed. Surely the question whether the first petition was properly filed must be open after transfer in such a case; if it is, no useful purpose would be served by transferring other petitions there only to be dismissed along with the one erroneously filed.

A less radical interpretation of § 2112(a) might also sustain transfer without a determination that the transferee circuit has jurisdiction with respect to every state's plan that is under attack. The transfer section requires only that proceedings be instituted in two or more courts with respect to "the same order." It might therefore suffice, even if the transferee forum must have jurisdiction, that it have jurisdiction over some portion of the order; and the jurisdiction of the D.C. Circuit over the Administrator's order insofar as it affected the District of Columbia was clear. This argument, however, would require transfer if one petition attacked a provision based upon considerations peculiar to California and another one peculiar to Connecticut, while forbidding transfer if the Administrator had chosen to enunciate parallel actions respecting several states in more than one formally titled "order." It might be preferable, when a single order disposes of a variety of disparate matters, to determine the meaning of "order" on the admittedly uncertain basis of litigation convenience in the particular case.

A further problem with transfer concerns whether or not regulations are "orders" within § 2112. The APA excludes them from its definition of "orders," 5 U.S.C. § 551(6) (1970), and some courts have held them outside provisions for direct review of administrative "orders" in the courts of appeals. *See* Currie & Goodman, *supra* note 95, at 39-41. It is highly probable that what Congress had in mind in the transfer statute were adjudicative orders; the statute and its history are permeated with references to the "record," *see* S. Rep. No. 2129, 85th Cong., 2d Sess. (1958), which is a concept only recently given content as to rulemaking decisions not required to be based on the record. *See* Currie & Goodman, *supra* note 95, at 43-48. The potential multiplicity of parties and of issues may make the appropriateness of mandatory transfer and consolidation less clear when general regulations are to be reviewed.

The First Circuit's holding that the District of Columbia Circuit was the appropriate one in *NRDC* may have meant that venue was improper in the transferor court; and a later decision has held § 2112 inapplicable in such an instance, Dayton Power & Light Co. v. EPA, 520 F.2d 703, 708 (6th Cir. 1975), without giving reasons. *Contra*, NLRB v. Bayside Enterprises, Inc., 514 F.2d 275 (1st Cir. 1975). Neither the language nor the purpose of § 2112, however, appears to make this fact decisive, though a comparable district-court provision was apparently thought insufficient to provide for transfer from an improper forum. *See* 28 U.S.C. §§ 1404(a), 1406 (1970). Goldlawr v. Heiman, 369 U.S. 463 (1962), lends some support to a broad reading here, for it held that § 1406, which expressly dispenses with the need for proper venue, implicitly makes personal jurisdiction unnecessary as well.

Finally, several courts have found an "inherent" power in the courts of appeals to transfer cases, even from a forum in which venue is improper, for example, Dayton Power & Light Co. v. EPA, 520 F.2d at 708; Georgia-Pacific Corp. v. FPC, 512 F.2d 782, 783 (5th Cir. 1975), but only to a court in which the case could properly have been filed, Eastern Air Lines, Inc. v. CAB, 354 F.2d 507, 510 (D.C. Cir. 1965).

[299] NRDC v. EPA, 475 F.2d 969, 969-70 (D.C. Cir. 1973).

More recently the Sixth Circuit reached the same conclusion when the nondegradation regulations affecting all state plans were challenged in several circuits at once.[300]

On the facts of these cases it would certainly have been wasteful to have had eleven review proceedings instead of one; and the issues were certainly of national significance. However, the flexible interpretation of the term "appropriate circuit" adopted in the *NRDC* opinions requires the courts to decide in each case what is the most suitable forum. This in turn may result in a good deal of threshold litigation, precisely the kind of litigation that venue statutes are intended to avoid. Such statutes make rough determinations as to the suitable forum in broad categories of cases, on the basis that a perfect allocation of individual cases to the best court is not worth the cost in litigating over what is, after all, an ancillary question. In their desire to achieve a sensible resolution of the particular case, the *NRDC* opinions appear to leave us essentially without a venue statute for determining where to challenge action with respect to the approval of implementation plans.

The problem of uncertainty would be reduced if we could construe the *NRDC* opinions to hold that questions of national import must be decided in the District of Columbia, while others are to be decided locally. However, they enunciate no such simple test. The First Circuit stressed the "flexible" nature of the venue provision, the fact that the parties to all eleven cases were identical, and the fact that the first petition had been filed in the District of Columbia; the transferee court implied that a single forum would be appropriate for all questions about implementation plans covering a single metropolitan region. Which forum to choose in the latter situation,[301] or what to do if the parties differ[302] or if there is no petition in the D.C. Circuit, is by no means clear. Other courts, moreover, have paid no heed to any distinction between local and national issues; without referring to the *NRDC* venue cases, five courts of appeals have entertained identical arguments that state variance provisions are illegal,[303] five that the statute requires consideration of the cost of compliance,[304] and four that the states may not be ordered to engage in regulatory activities.[305]

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[300] Dayton Power & Light Co. v. EPA, 520 F.2d 703 (1975). The opinion adds nothing to the reasoning of the earlier cases except to note that the regulations in issue had been adopted pursuant to an order of the District of Columbia courts. However, while the Sierra Club was a party in both the Sixth and the D.C. Circuits, the parties in the two forums were not otherwise identical; the decision therefore may reflect a further step toward consolidating all "national" issues in the District of Columbia.

[301] *See* District of Columbia v. Train, 521 F.2d 971, 979 n.6 (D.C. Cir. 1975), noting the transfer of Fourth Circuit petitions affecting the National Capital Air Quality Control Region to the D.C. Circuit without giving reasons for the choice.

[302] In District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), petitions were filed by different parties in two circuits, and transfer was ordered without discussion. *Id.* at 979 n.6. *See* Dayton Power & Light Co. v. EPA, 520 F.2d 703, 705-06 (6th Cir. 1975).

[303] All five were styled *NRDC v. EPA*: 507 F.2d 905, 908 (9th Cir. 1974); 494 F.2d 519, 522 (2d Cir. 1974); 489 F.2d 390, 393 (5th Cir. 1973); 483 F.2d 690, 691 (8th Cir. 1973); 478 F.2d 875, 879 (1st Cir. 1973). Three conflicting positions were taken, and the issue was resolved in Train v. NRDC, 421 U.S. 60 (1975).

[304] St. Joe Minerals Corp. v. EPA, 508 F.2d 743, 747-48 (3d Cir. 1975); Buckeye Power, Inc. v. EPA, 481 F.2d 162, 168 (6th Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495,

In any case, referring all issues of national importance to a single circuit would not put an end to definitional problems. What would happen, for example, if a federal position on the general availability of technology to control gold mine emissions turned out to have practical application only to three circuits in which gold mines exist? But there is a more serious problem with such a test: one arguing that a particular measure is unnecessary to meet ambient standards in Des Moines and that the EPA must reject unnecessarily strict measures would apparently have to file in two courts at the same time.

There is another possible reading of the "appropriate circuit" that would take account of the failure to provide explicitly for local review while avoiding some of the uncertainty of the *NRDC* approach: that Congress intended to leave the question to be resolved according to general venue statutes. Such a course would be entirely sensible if review were in the district courts, for the Judicial Code contains explicit provisions specifying district court venue.[306] That there is no general venue statute for the courts of appeals,[307] however, makes the inference seem unlikely. If Congress in prescribing the "appropriate" circuit meant to incorporate district court venue provisions by analogy, those most nearly in point allow civil actions against federal agencies or officers to be brought where the plaintiff or defendant resides—which may be wherever it does business, if it is a corporation[308]—or where the cause of action arose, which common sense would say, if metaphysics allows, is where the plan is to take effect.[309] Some uncertainty in choice of analogy is provoked by dissimilar provisions for Tucker Act or tort actions against the United States itself.[310]

498-99 (4th Cir. 1973) (all holding costs relevant). *Contra*, Union Elec. Co. v. EPA, 515 F.2d 206, 215-16 (8th Cir. 1975); Indiana & Mich. Elec. Co. v. EPA, 509 F.2d 839, 843 (7th Cir. 1975).

[305] Pennsylvania v. EPA, 500 F.2d 246, 259 (3d Cir. 1974) (holding they may). *Contra*, Brown v. EPA, 521 F.2d 827, 831 (9th Cir. 1975); Maryland v. EPA, 530 F.2d 215, 225 (4th Cir. 1975); District of Columbia v. Train, 521 F.2d 971, 986-87 (D.C. Cir. 1975). On the other hand, petitions in several circuits attacking indirect-source provisions incorporated in various state plans have been transferred to the District of Columbia Circuit, presumably because such provisions were adopted in response to that court's decision in the *NRDC* case. NRDC v. EPA, 475 F.2d 969 (D.C. Cir. 1973). *See* City of Highland Park v. Train, 519 F.2d 681, 689 (7th Cir. 1975).

[306] 28 U.S.C. §§ 1391-1403 (1970 & Supp. V 1975).

[307] The Federal Rules of Appellate Procedure provide that petitions to review administrative orders shall be filed in "a court of appeals which is authorized to review such order." FED. R. CIV. P. 15(a). Similarly, the APA speaks of review in "a court of competent jursidiction," 5 U.S.C. § 703 (1970). Venue is commonly but variously prescribed in statutes setting up each agency. *E.g.*, 15 U.S.C. § 45(c) (1970) (Trade Commission orders in circuit where act occurred or plaintiff resides or does business); 47 U.S.C. § 402(b) (1970) (FCC license denials in District of Columbia Circuit).

[308] *See* 28 U.S.C. § 1391(c) (1970). There are, however, questions both as to whether this provision applies to corporate *plaintiffs* and as to whether it should be read into venue provisions pertaining to suits against the United States or its officers. *Id.* § 1391(e). *See* text accompanying notes 315-20 *infra*.

[309] *See* 28 U.S.C. § 1391(e) (1970).

[310] *See* 28 U.S.C. § 1402 (1970 & Supp. V 1975).

Thus there are at least four plausible interpretations of the statutory term "appropriate" circuit, each with its own drawbacks. To require an ad hoc determination of the most appropriate forum in the individual case, as apparently held in the *NRDC* cases, invites wasteful threshold litigation. To refer all issues of "national" concern to the District of Columbia Circuit would create some uncertainty and would require many cases to be split in two. To hold analogous venue statutes incorporated in section 307 would also generate uncertainty, would allow forum shopping, and would be hard to reconcile with the statute's apparently singular reference to "the" appropriate forum. To read "appropriate" as a euphemism for "local," while it accords best both with the explicit intention of the Senate Committee and with the juxtaposition of the D.C. Circuit as the forum for reviewing national standards, would have required the waste of eleven identical proceedings in *NRDC*.

The lessons to be drawn from this analysis are three. First, as a matter of statutory construction, the *NRDC* opinions are a classic example of hard cases and bad law. The Senate Committee's unmistakable statement of intention would have been followed if legislative history is ever to have a place in interpretation, as it is a perfectly plausible rendering of the statutory language. Second, the statute itself is intolerably vague; it lends itself to useless threshold litigation over four conflicting interpretations. Third, the only judicial interpretation of the statute to date is itself unacceptably uncertain, promising additional litigation over its application.

A bill recently passed by the House would provide for exclusive District of Columbia review of implementation-plan approval "if such action is based on a determination of nationwide scope or effect and if the Administrator finds and publishes that such action is based on such a determination."[311] This proposal would leave intact in the absence of such a finding the vague reference to the "appropriate" circuit, which may yet spawn additional litigation—for example, when an issue is not national but is common to portions of a control region extending beyond a single circuit. Moreover, it would require a District of Columbia forum for all national issues whether or not there are challenges to more than one state's plan, whether or not the parties are identical, and whether or not local issues are also present, although the result in some cases may be either to split a single case in two or to burden the D.C. Circuit with issues local to another circuit. It is left unclear whether pendent local issues are to be separated out or litigated in the district, or whether the court may decide this question according to the facts of each case. In an effort to reduce litigation over what is a "national" issue, the bill would give the EPA, an interested party, effective power to select a favorable forum. To the extent judicial review of the EPA's certification is to be allowed—and the bill leaves this question up in the air—uncertainty and undesirable threshold litigation would reappear. If such a provision is enacted, it should at least make clear that issues that are not national in scope are to be reviewed in the circuit containing the state whose plan is at issue, that the EPA's certification is not reviewable, and that the D.C. Circuit has discretion to transfer pendent local questions. My general belief in the desirability of divergent views on questions of national import,[312] however, leads me to recommend codification of the Senate Committee position that all questions respecting implementation plans are reviewable in the circuit containing the state whose plan is challenged,[313] relying on the transfer power to alleviate undue multiplicity of litigation in extreme cases such as *NRDC*.[314]

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[311] H.R. 10498, 94th Cong., 2d Sess., § 305(c)(4) (1976).

C. The Vague Test of the FWPCA

The Administrative Conference advocates exclusive D.C. Circuit review of national standards under the FWPCA. Even if this view becomes law, however, there will remain EPA actions subject to local review in local courts of appeals, such as the grant or denial of permits, action on state permit programs, and water quality related standards for individual bodies of water under section 302.[315] The present provision for venue in the circuit where the petitioner "resides or transacts such business," whether or not its applicability is later limited to local determinations, is subject to serious objections.

First, with respect to corporations, the reference to the circuit where the petitioner "resides" is ambiguous. Arguably it incorporates the definition of the general venue statute,[316] namely, that a corporation "resides" wherever it does business. If so it seems undesirably broad, for California hardly seems the right place to argue a case involving a Pennsylvania factory just because the company also does business there. But the general definition has not been read into every special venue statute,[317] and corporations have been held under the patent venue statute to "reside" only where incorporated.[318] Moreover, it is not even clear whether or not the general definition applies to corporate plaintiffs as well as to defendants,[319] or whether it incorporates the untidy law of "doing business" that governed personal jurisdiction before the enactment of long-arm statutes. Furthermore, even a narrower definition of residence would hardly point to the most appropriate forum, since the place of incorporation or principal place of business—the latter itself an elusive and litigation-provoking concept[320]—may be far from the plant whose discharge is at stake.

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[312] *See* text accompanying notes 284-85 *supra*.

[313] To add the District of Columbia Circuit at the petitioner's option, as in many administrative review statutes, would afford a safety valve against wasteful multiple litigation as in *NRDC* without inconveniencing the government, but at the cost of forum-shopping and of further burdening that busy court and requiring it to decide many issues of purely local concern.

[314] *Cf.* American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1035 (3d Cir. 1975), in which transfer was used to consolidate related challenges against nationwide effluent limitations under the FWPCA's provision for decentralized review. Although the transfer route requires the apparently wasteful step of initial multiple filings, it has the intangible advantage, as compared with a flexible test for the "appropriate" initial forum, of implying that local review is the norm, to be departed from only upon a special showing; it is conceivable that this difference in emphasis may discourage unnecessary litigation. Moreover, the considerable discretion embodied in the principle of transfer is a substantial safeguard against potential reversal on venue grounds in the Supreme Court. In light of the ambiguity of existing transfer powers, *see* note 298 *supra*, the Administrative Conference recommends an amendment "to remove doubts about the authority of any court of appeals to transfer such cases to any other court of appeals to avoid undue duplication, or in the interests of justice." ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ A(4)).

The Conference, while favoring centralized review for nationwide regulations, has adopted the Senate Committee position. *Id.* ¶ A(3). The costs of attempting to centralize review of national questions in implementation plans are too high.

[315] 33 U.S.C. § 1312 (Supp. V 1975). ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-3, ¶ E), would add to this list the approval of state water quality standards and of state proposals to ban the discharge of marine sewage.

In all these cases, as with implementation plans, questions of national import may well arise. As in the case of implementation plans, however, the Conference was unimpressed by EPA's request for centralized review of such issues.

[316] 28 U.S.C. § 1391(c) (1970).

Ambiguity is compounded by the FWPCA's unfortunate provision for venue where the petitioner "transacts such business." There is no antecedent for "such," so it is unclear whether the requisite fact is the transaction of business affected by the challenged regulation or the transaction of any business at all. The latter reading would appear unjustifiably broad, since convenience and familiarity with local conditions dictate a forum with some connection with the controversy. Even the more restricted meaning can be unduly stretched, as when one court concluded that business transacted at company headquarters in Missouri would be affected by Colorado's permit program.[321] The court sidestepped the question of corporate residence and expressly refused to resolve the ambiguity respecting transaction of business, for it found both tests satisfied, while quoting the Conference Committee's paraphrase of the statute as allowing venue where the petitioner "resides or transacts business." The court did largely redeem the situation by transferring the case to the Tenth Circuit, but it would avoid a situation of musical chairs if the courts held, and the statute provided, that venue lay in Colorado in the first place.

Drafting the appropriate venue provision, however, is not so easy as it might appear. The Administrative Conference position on national standards somewhat simplifies the task, for most of the actions remaining subject to local review apply only to a single state (for example, permit program approval) or to a single facility (permit issuance or denial). The Conference thus recommends that such determinations be reviewed "in the circuit containing the state or facility."[322] For simplicity's sake the recommendation is silent as to section 302 standards, which may affect a body of water (such as Lake Superior) in more than one circuit. Such standards should be reviewable in one of those circuits, preferably that in which the petitioner is affected by the challenged action.

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[317] *See* Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957) (patent case under 28 U.S.C. § 1400(b)).

[318] *Id.* at 226.

[319] *Compare* Southern Paperboard Corp. v. United States, 127 F. Supp. 649, 650 (S.D.N.Y. 1955), *with* Chicago & N.W. Ry. v. Davenport, 94 F. Supp. 83, 85 (S.D. Iowa 1950).

[320] *See* Kelly v. United States Steel Corp., 284 F.2d 850 (3d Cir. 1960).

[321] Peabody Coal Co. v. EPA, 522 F.2d 1152, 1153 (8th Cir. 1975).

[322] ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ A(2)).

The drafting problem becomes more acute if the present principle of local review for national standards is retained or extended to the CAA. When a person subject to the requirement challenges such a standard, it would make sense to channel review to a circuit in which he makes the affected discharge or conducts the affected business. When the petitioner is a consumer of air or water arguing that a national standard is too lax, analogy suggests review should take place where he is affected by the action of which he complains. While such a test would no doubt lead to some litigation, it is a somewhat more precise variant of the familiar reference to the place where the cause of action arose; it would probably be the best single standard if local review were to be provided for all actions reviewable in the courts of appeals.

VI. STANDING

Section 304 of the CAA allows a suit by "any person";[323] section 505 of the FWPCA by a person "having an interest which is or may be adversely affected";[324] section 509 of the same Act by "any interested person";[325] and section 307 of the CAA is silent on the question of standing.[326] The existence of these four conflicting provisions for various types of judicial review makes for both uncertainty and inconsistency in the administration of the laws.

A. Interpretation

1. "Any Person"

"Any person" may sue to compel the Administrator to perform a nondiscretionary duty under section 304 of the CAA. It is difficult to construe this language not to confer standing on everyone; the First Circuit has described it as a provision for "universal" standing.[327] The legislative history contains nothing to cast doubt on this interpretation. The Senate Report stressed the need for citizen suits to make up for possible government laxity and observed that persons suing under section 304 "would be performing a public service";[328] nothing was said about any limitation on who might bring suit.[329]

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[323] 42 U.S.C. § 1857h-2 (1970).

[324] 33 U.S.C. § 1365(g) (Supp. V 1975).

[325] *Id.* § 1369.

[326] 42 U.S.C. § 1857h-5 (1970).

[327] NRDC v. EPA, 484 F.2d 1331, 1337 (1st Cir. 1973) (dictum).

[328] S. REP. NO. 1196, 91st Cong., 2d Sess. 38 (1970).

[329] *Id.* at 36-39. One court, however, has without explanation stated that § 304 does not dispense with the necessity for demonstrating "a sufficient interest in the specific controversy as to meet traditonal concepts of standing." Coalition for Clean Air v. District of Columbia, 6 ERC 1363, 1365 (D.D.C. 1974) (dictum), *citing* Sierra Club v. Morton, 405 U.S. 727 (1972). Finding a sufficient allegation of injury, the court upheld standing.

2. *"An Interest . . . Adversely Affected"*

The original Senate version of the comparable citizen-suit provision of the FWPCA would similarly have conferred universal standing.[330] A House amendment would have limited standing to persons "affected" and to groups whose participation in the administrative process had shown "a special interest in the geographic area in controversy."[331] Thereafter, in *Sierra Club v. Morton*,[332] the Supreme Court held that only a person injured had standing to challenge governmental action under the APA, which provides for review at the instance of a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[333] The Conference Committee, leaving intact the sentence allowing suit by "any citizen," thereupon defined "citizen" for purposes of section 505 as "a person having an interest which is or may be adversely affected."[334] This language, the Conference Report explains, "reflects the decision of the U.S. Supreme Court in the case of Sierra Club v. Morton."[335]

It seems odd that the committee felt compelled, in drafting a statutory standing provision, to incorporate the test the Court had employed in construing another statute. Moreover, there may be no little confusion in administering the standing requirement of section 505. The language chosen—"an interest . . . adversely affected"—is neither that of *Sierra Club* nor of the statute that opinion construed. All *Sierra Club* holds is that one who does not allege injury may not sue; Congress could have adopted that requirement by conferring standing on anyone "adversely affected." The ambiguous additional requirement of an "interest" may be merely redundant, or it may suggest that something beyond simple injury is required. The APA, on the other hand, has been authoritatively construed to require not only injury but also that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[336] Since this language was quoted with evident approval in dictum in the *Sierra Club* opinion, it is arguable that the Conference Committee meant by its use of the word "interest" to incorporate the full standing requirements of the APA. Again, however, less ambiguous terms were at hand to accomplish this goal; the bare word "interest" does not immediately suggest a determination of the class protected by the provision sought to be enforced, and a paraphrase of the zone test or a reference to the APA would have made matters perfectly plain. Indeed, the most natural reading of the naked words of section 505 would suggest a reincarnation of the old requirement, specifically discredited by the Supreme Court in construing the APA, that the plaintiff have a "legally protected interest."[337] Such an interpretation, however, as well as any fourth possible meaning of "interest" that departs from the *Sierra Club* or APA tests, would be clearly contrary to the explicit intention of the Conference Committee to "reflect" the *Sierra Club* decision.[338]

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[330] *See* H.R. REP. NO. 1465, 92d Cong., 2d Sess. 145 (1972).

[331] *See* H.R. REP. NO. 911, 92d Cong., 2d Sess. 363 (1972).

[332] 405 U.S. 727 (1972).

[333] 5 U.S.C. § 702 (1970).

[334] H.R. REP. NO. 1465, 92d Cong., 2d Sess. 146 (1972).

[335] *Id.*

[336] Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970).

My inclination would be to hold that "interest . . . adversely affected" is a long-winded way of saying "adversely affected." The most probable explanation of the Conference Committee's behavior is that it detected in *Sierra Club* intimations of constitutional limitations on standing, although the case explicitly turned on statutory construction, and the court in footnote dictum appeared to disclaim the existence of any constitutional limitation.[339] If the standing requirement was inserted out of perceived constitutional compulsion, it should be read to require only injury in fact, for the Court has never suggested even in dictum that anything more is required by the Constitution, and it has expressly said Congress may confer standing outside the zone of protected or regulated interests.[340]

3. *"Interested Person"*

Section 509 of the FWPCA authorizes any "interested person" to challenge certain EPA regulations and actions of the Administrator with regard to permits. The Committee reports are silent on the meaning of "interested person."[341] Plainly enough, the intention was to avoid conferring standing on everyone. But the choice of language is most unfortunate, for it departs from all established landmarks, leaving the courts, I cannot resist saying, at sea. "Adversely affected" would have been easily understood in light of *Sierra Club*; the APA or its zone test could have been plugged in if that had been thought desirable. At the very least one might have expected either consistency with section 505 of the same statute or an explanation of why and how the two sections differed. The attractive conclusion that an "interested person" under section 509 is the same as one "having an interest . . . adversely affected" under section 505 is made more difficult by the fact that the former language was already in the bill before the *Sierra Club* decision,[342] when the latter section was conspicuously broader;[343] thus the "interested" language of section 509 cannot be explained as a response to felt constitutional compulsion.

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[337] *See id.*

[338] *See* Montgomery Envt'l Coalition v. Fri, 366 F. Supp. 261, 264 (D.D.C. 1973) (observing that § 505 incorporates the *Sierra Club* test, quoting the APA, and upholding standing because the plaintiff had alleged injury).

[339] Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972).

[340] Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 151-53 (1970).

[341] *See* H.R. REP. NO. 911, 92d Cong., 2d Sess. 135-36 (1972); H.R. REP. NO. 1465, 92d Cong., 2d Sess. 147-48 (1972).

[342] *See* H.R. REP. NO. 911, 92d Cong., 2d Sess. 369 (1972).

[343] *Id.* at 363.

Nevertheless, I would opt for the equation of the two phrases. The most natural reading of "interested person" is one requiring that there be something at stake; the language does not readily suggest the further APA requirement that the litigant be within the protected or regulated zone. Moreover, the insertion of a special standing provision suggests, although only mildly, a dissatisfaction with leaving the question to the established test of the APA, which would ordinarily otherwise apply. A final possibility would be to equate "interested" with the contemporaneous House bill provision in section 505 for groups—for example, for conservation organizations[344]—showing "a special interest" in the area affected.[345] But the latter provision was altered by the Conference Committee in an effort to conform to the *Sierra Club* decision; it should not be presumed that the Committee accidentally left intact another provision of the same statute that did not so conform.

4. *Section 307*

Remaining for discussion is section 307 of the CAA, which provides that "a petition for review" of specified regulations and other actions "may be filed" but fails to say by whom. The specification in an earlier draft that such a petition might be filed by any "interested person"[346] was dropped without explanation.

A number of courts have entertained section 307 challenges by conservation organizations without adverting to any question of standing.[347] The District of Columbia Circuit, however, has clearly opined in dictum that the omission of any standing provision reflects "a determination to let standing in § 307 suits be controlled by the Administrative Procedure Act,"[348] and two other courts have thrown out section 307 challenges made by organizations failing to allege injury to interests protected or regulated by the statute.[349]

This resolution seems correct. The APA clearly applies by its own terms, and the silence of section 307 does not suggest that any different standing test was intended. The omission of the word "interested" is as consistent with a desire to avoid the confusion of unfamiliar terminology as it is with a desire to remove impediments to standing. That the test of section 307 is apparently more restrictive than that of the comparable section of the FWPCA, which retains the word "interested," is a problem for Congress rather than for the courts. Yet the First Circuit, in a highly creative opinion, has spelled out a distinct theory in support of the conclusion that anyone may file a petition under section 307.

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[344] *See* NRDC v. Train, 519 F.2d 287, 288 (D.C. Cir. 1975), in which the court in an action held to lie under the APA and not under § 509, and, without addressing the issue of standing directly, described the plaintiffs as "corporations interested in the implementation and enforcement of federal laws protecting the environment." Such an interest is clearly insufficient under the APA, whatever its status under § 509. *See generally* Sierra Club v. Morton, 405 U.S. 727 (1972).

[345] *See* text accompanying note 331 *supra*.

[346] *See* S. REP. NO. 1196, 91st Cong., 2d Sess. 125 (1970).

[347] *E.g.*, a series of cases entitled *NRDC v. EPA*: 494 F.2d 519 (2d Cir. 1974); 489 F.2d 390 (5th Cir. 1974); 483 F.2d 690 (8th Cir. 1973). The Fifth Circuit case was reviewed in the Supreme Court, again without mention of standing. NRDC v. Train, 421 U.S. 60 (1975).

[348] NRDC v. EPA, 512 F.2d 1351, 1354 n.14 (D.C. Cir. 1975).

[349] *See generally* NRDC v. EPA, 507 F.2d 905 (9th Cir. 1974); NRDC v. EPA, 481 F.2d 116 (10th Cir. 1973).

The case was one of the many filed by the NRDC challenging state implementation plans. Successful in part on the merits, the Council moved for attorneys' fees. Section 307 is silent on this subject, as it is on standing. Section 304, however, which authorizes suit by "any person" to compel performance of a nondiscretionary duty, specifically authorizes attorneys' fees in "any action brought pursuant to" section 304. Perceiving no reason why Congress might have thought attorneys' fees appropriate only in district court actions, the court held that petitions under section 307 were actions brought under section 304. Section 307, said the court, was merely a venue provision: "The authorization for, and conditions of, suit are contained in § 304(a). The legislative history reveals that § 307 does no more than direct that some proceedings must be brought in the circuit courts."[350] Not only does this argument apply with equal force to the standing provision of section 304; the court in explicit dictum declared that anyone could sue under section 307: "The section providing for review of actions of the Administrator is § 304(a), and since § 304(a) specified that standing was universal, there was no need to repeat the allowance in § 307."[351]

The terminology of section 304 makes this construction seem implausible. As I have argued above,[352] an action to compel performance of a nondiscretionary duty is a highly unusual means of expressing a general principle of judicial review; it is the traditional language of mandamus, and mandamus for the Administrator's inaction was the type of case discussed in the legislative history in connection with section 304. Moreover, the separation of sections supports this analysis; a Congress that believed it had set out a general provision for judicial review in section 304 would be expected to insert ancillary venue provisions at that point in the statute, not to return to the subject three sections later, without cross-references, using the distinct language of judicial review. The District of Columbia Circuit, focusing largely upon the quite separate histories of sections 304 and 307, has refused to follow the First Circuit, reluctantly holding that attorneys' fees are unavailable under the latter: "Sections 304 and 307 contemplate distinct groups of cases."[353] Particularly telling was that court's demonstration that it is invariably impossible for a litigant to meet the requirements of both sections: while section 307 requires review to be sought within thirty days after the challenged action, section 304 requires sixty-day notice to the Administrator before filing suit. Thus, the First Circuit's holding that section 307 petitions are actions under section 304 means that nobody can ever challenge the actions listed in section 307. It is impossible to believe Congress had any such intention. The inconsistent standing requirements of the two sections deserve Congress' attention, but the APA provides the test of standing under section 307.

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[350] NRDC v. EPA, 484 F.2d 1331, 1336 (1st Cir. 1973).

[351] *Id.* at 1367.

[352] *See* text accompanying notes 209-11 *supra*.

[353] NRDC v. EPA, 512 F.2d 1351, 1355 (D.C. Cir. 1975).

B. The Constitutional Question

Finally, the serious constitutional question posed by the universal standing provision of section 304 merits discussion. Much has been written on the constitutional status of the standing requirement,[354] and this is hardly the place for a definitive resolution. The Supreme Court has never had occasion to rule on the matter one way or the other, and its dicta conflict. On the one hand, such a judicial conservative as Mr. Justice Harlan once said that Congress might confer standing on anyone,[355] while the majority in *Sierra Club* observed that "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the power of Congress to determine."[356] On the other hand, in 1974 the Court described the earlier *Data Processing* case[357] as having "held that whatever else the 'case or controversy' requirement embodied, its essence is a requirement of 'injury in fact.' "[358] In 1975, in finding a lack of standing in a case in which Congress had not attempted to give it, the Court declared flatly that "the art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party,"[359] and a 1976 opinion contains no fewer than seven explicit obiter references to a constitutional requirement of injury.[360]

Given this inconclusive direction from above, the courts of appeals have divided on the question of the constitutionality of unrestricted standing under the CAA. The District of Columbia Circuit, in a case arising under section 304, has squarely upheld the citizen suit provision in reliance on the *Sierra Club* dictum quoted above.[361] The Ninth and Tenth Circuits, in refusing to read the unlimited standing provision of section 304 into section 307, have argued that to do so would be unconstitutional.[362] The Tenth Circuit opinion attempts an analysis in terms of the policies underlying the constitutional requirement of a "case" or "controversy": absent injury, there is no assurance that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the . . . challenge will be made in a form thought to be capable of judicial resolution,"[363] and "unrestricted" standing endangers the separation of powers.

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[354] *See, e.g.*, Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?* 78 YALE L.J. 816 (1969).

[355] Flast v. Cohen, 392 U.S. 83, 130 (1968) (dissenting opinion).

[356] Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) (citations omitted).

[357] *See* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 151-53 (1970). Since standing was upheld under a statute requiring injury, the constitutional argument in *Data Processing* was pure dictum.

[358] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218 (1974).

[359] Warth v. Seldin, 422 U.S. 490, 499 (1975).

[360] *See* Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 38-42 (1976).

[361] Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809, 814 n.26 (D.C. Cir. 1975).

[362] NRDC v. EPA, 507 F.2d 905 (9th Cir. 1974); NRDC v. EPA, 481 F.2d 116 (10th Cir. 1973).

The argument of "specificity" does not seem compelling in the present context, since it appears that individual circumstances are unlikely to be relevant to the validity of a regulation even when it is challenged by a person who is injured.[364] But the requirement that the parties be sufficiently adversary to assure adequate presentation of both sides is a significant obstacle to citizen standing. That the plaintiff is hurt by the action he attacks undoubtedly helps to assure that the case will be vigorously prosecuted. A glance at the *Sierra Club* case, however, suffices to show that injury is not indispensable to provide a true adversary; no one can honestly entertain fears of inadequate presentation when the Sierra Club sues to protect the environment. Conversely, the trivial injury the Supreme Court has held sufficient to satisfy standing requirements[365] is far from absolute assurance of vigorous advocacy; a person nominally injured may be collusively in league with the defendant. Nevertheless, the undesirability of a subjective inquiry in each case into the degree of ferocity with which the plaintiff opposes the action he challenges argues in favor of drawing a firm and administrable line, though it be inevitably inexact at the margin. Moreover, even if a careful congressional provision granting standing to those demonstrating a sufficient adverse position would be upheld, the universal standing provision in section 304 is overbroad unless one accepts the argument of Professor Scott: "If the plaintiff did not have the minimal personal involvement and adverseness which Article III requires, he would not be engaging in the costly pursuit of litigation."[366]

Adequate presentation, moreover, is not the sole consideration. Although there is some appeal to Mr. Justice Harlan's position that arguments based on the separation of powers are somewhat blunted when Congress has specifically authorized citizen suits to review its own actions,[367] this cannot be a complete answer. First, it is the actions of the Executive, not of the Congress, that the CAA subjects to citizen attack. Moreover, no one would argue, I suppose, that Congress could give the courts jurisdiction to decide unripe or moot cases, even if there were assurance that both sides would be presented by the nation's best lawyers. It is in the interest of the courts, as well as of the Congress, that the former not be plunged unnecessarily into making controversial pronouncements on important legal questions. The case or controversy requirement may be viewed as confining the courts to their traditional job of determining whether a plaintiff is entitled to something of value which he claims from the defendant. That in exercising this function the courts inevitably are called upon to resolve important public questions, and that their doing so is a crucial cog in our system of checks and balances, does not mean the courts may reach out to supervise the government by making pronouncements in "cases" in which the plaintiff has nothing at stake.[368]

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[363] Flast v. Cohen, 392 U.S. 83, 106 (1968).

[364] *See* text accompanying notes 258-60 *supra*.

[365] *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973). "We have allowed important interests to be vindicated by plaintiffs with no more at stake . . . than a fraction of a vote, . . . a five dollar fine and costs, . . . and a $1.50 poll tax . . . . '[A]n identifiable trifle is enough for standing . . . .' " *Id.* (citations omitted).

[366] Scott, *Standing in the Supreme Court: A Functional Analysis*, 86 HARV. L. REV. 645, 674 (1973).

[367] Flast v. Cohen, 392 U.S. at 131-32 (dissenting opinion).

The constitutional policy of checks and balances that underlies judicial review,[369] however, can be said to argue in favor of a construction of "case" and "controversy" that would permit Congress to extend standing beyond the injured. When harm is highly concentrated, as in automobile negligence and breach of contract, the probability of a suit by the victim is generally sufficient to assure vindication of the law. When the harm is widespread and individually small, however, as is often true in pollution cases, it may be that no victim will find it worth the cost to sue. There is even the possibility in some environmental situations that no one is injured in the *Sierra Club* sense, as when a deep-sea species protected by the law is threatened with extinction. In either of these cases the injury requirement may frustrate fulfillment of the law.[370] The inability of those within the protected class to sue has been an explicit reason for finding standing in others who are injured;[371] whether similar considerations will be held relevant to the definition of "case" or "controversy" remains to be seen. In any event, traditional principles of judicial restraint should enjoin considerable deference to the determination of Congress that the injury requirement is not a part of the "case" or "controversy" limitation.

I would venture to predict, on the basis of what I think are the predominant as well as the most recent Supreme Court dicta, that injury will be held to be a constitutional requirement. In policy terms this would superficially appear to be a matter of some concern. As one court observed in finding itself unable to award attorneys' fees under section 307, the citizen suit is an important counterbalance to the ever present polluters who clearly have standing: "[T]here may come a day soon when EPA's determinations, though frequently attacked because they are too stringent, are only seldom contested because they are not stringent enough."[372] In all probability, however, restricting standing to the injured will not make an important practical difference under the pollution laws. For pollution usually hurts somebody, and, subject to the barratry laws, means can be found, including group representation of members and the provision of attorneys' fees, for augmenting the resources of the victim whose stake will not support the cost of suit. In the Ninth Circuit case, for example, while the petition of the Natural Resources Defense Council was dismissed for want of standing, the court reached the merits because a copetitioner, who the court said would "suffer injury if compelled to breathe air less pure than that mandated by the Clean Air Act," was a resident of the state whose plan was under attack.[373] Moreover, the informer's action noted by Professor Berger may provide a last legislative means for assuring a watchdog on the anti-pollution side of the fence; the Supreme Court, without discussion, has upheld a judgment in favor of a plaintiff, evidently otherwise unaffected, who had been authorized to sue for fraud against the government and to keep half the damages for himself.[374]

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[368] *See* A. Bickel, The Least Dangerous Branch 114-15 (1962).

[369] *See* Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[370] *See* Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 Nat. Resources J. 76, 78-79, 81 (1973).

[371] *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 254-56 (1953).

[372] NRDC v. EPA, 512 F.2d 1351, 1358 (D.C. Cir. 1975).

C. The Remedy

Congress ought to eliminate the inconsistency by prescribing a single test for standing under all four provisions.[375] One goal of such a test that I think should be obvious is to avoid the use of unfamiliar terms such as "interest affected" or "interested party," which will provoke unnecessary litigation. Conferring standing on everyone would meet this goal but would probably be unconstitutional. Either the zone test or a simple injury requirement, I believe, would be reasonably precise while serving the purposes of the standing requirement. The Committee on Judicial Review of the Administrative Conference proposed that the statutes provide standing for anyone adversely affected by the action (or inaction) challenged, and I agree.

"Adversely affected" is the language of the familiar APA. Despite the qualification in that statute to adverse effect "within the meaning of a relevant statute," the term "adversely affected" has acquired a recognized meaning of its own. The Supreme Court has equated adverse effect with "injury in fact,"[376] which it has also said is the constitutional requirement.[377] A substantial body of law has grown up to define what constitutes the requisite injury. "Aesthetic and environmental" harm, as well as financial, may qualify;[378] it is immaterial that the injury is widely shared;[379] the injury need not be substantial, as "a five dollar fine" will do;[380] but a mere intellectual concern will not.[381] Of course there will be questions of interpretation. Short of abandoning all limitations on standing, the only alternative is to prescribe a detailed code listing the categories of persons entitled to sue. The difficulty of foreseeing all possible fact situations makes such an approach highly risky, and I am not convinced it would eliminate more uncertainty than it would create.

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[373] NRDC v. EPA, 507 F.2d 905, 910 (9th Cir. 1974). The court might have added, but did not, that the second branch of the APA test was also satisfied; for there can be no doubt that a principal purpose of the statute was to protect against injuries to the public health.

[374] United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943). Whether such a provision would withstand serious analysis is another question. While the monetary stake should guarantee an adversary presentation if sufficiently substantial, I doubt that such an artificial interest should overcome the policy against unnecessary intervention in the affairs of other branches of the government.

[375] The Administrative Conference is in accord with this position, ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ F); the Conference did not agree on what that test should be.

[376] *E.g.*, Sierra Club v. Morton, 405 U.S. 727, 733 (1972).

[377] *E.g.*, Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 39 (1976).

[378] United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686 (1973).

[379] *Id.*

Some will object that a test of injury in fact would not permit enough people to sue; others will contend that it would permit too many. To the first I would respond that the Constitution leaves no choice and that someone can almost always be found who is hurt by pollution. To the second I would argue that it is as important to keep the EPA from being too lax as it is to keep it from being too strict. Challenges by persons injured by the failure to adopt strict regulations seem essential to effectuating the statutory purpose of preventing undue pollution. To add the requirement that the injured party be in the regulated or protected class would probably make little practical difference, but it would add another source of litigation expense without materially advancing the policies behind the standing requirement. I would provide standing for anyone adversely affected.

VII. Conclusion

In its haste to do something positive about the environment, Congress has been quite careless in enacting provisions for judicial review under the pollution laws. The various provisions are inconsistent, incomplete, ambiguous, and in several respects misguided. It is time for a sober reconsideration and restatement of the provisions for judicial review in light of the accumulated experience and guided above all by the principle that jurisdictional provisions should draw bright lines to minimize the waste of litigation over whether the case has been brought in the right court.

Confronted with unsatisfactory statutory provisions for judicial review, the courts have understandably but improperly attempted on occasion to stretch the statute in order to achieve more sensible results. In other instances courts have shortsightedly ignored even sensible congressional directions in an effort to do justice in a particular case. Finally, some courts have felt required by ambiguous provisions to reach unfortunate results that Congress has not in fact required. Pending statutory amendment, the job of the courts is to do their best to carry out Congress' intentions, resolving true ambiguities so as to promote an efficient and sensible system of judicial review.

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[380] *Id.* at 689 n.14.

[381] *See* Sierra Club v. Morton, 405 U.S. at 739-40.

REPORT IN SUPPORT OF RECOMMENDATION 76-5

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PUBLIC PARTICIPATION IN THE ADOPTION OF INTERPRETIVE RULES AND POLICY STATEMENTS

*Michael Asimow**†

The Internal Revenue Service ruled that private hospitals need not offer free or below-cost medical services to the poor in order to maintain their tax-exempt status.[1] This ruling reversed the Service's prior position and presumably resulted in a substantial reduction in the availability of affordable hospital care to poor people.[2] The United States Parole Board adopted guidelines establishing criteria for parole decisions and specifying the range of months a federal prisoner must serve before his release from prison.[3] The Immigration and Naturalization Service changed its instructions to district directors concerning the effect of an alien's marriage on his deportation. As a result of the new directive, the marriage of a deportable alien to a resident alien would no longer be the basis for an indefinite extension of deportation.[4]

Each of these administrative rules had important and immediate consequences for an appreciable number of persons. The rules had a definite impact on access to medical care, terms in federal prisons, and residency in the United States. Yet in none of these instances did the agency give any prior notice that it was considering a new rule or permit the public to comment before its adoption. This lack of procedure contrasts sharply with the requirements for most rule-making under section 4 of the Administrative Procedure Act (APA),[5] which prescribes preadoption notice to the public and an opportunity for interested persons to comment on the proposed rule.

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† This article is based upon my report as consultant for the Committee on Rulemaking and Public Information of the Administrative Conference of the United States. The proposals made in this article have been accepted in substance by the Conference in Recommendation 76-5, *quoted in* note 266 *infra.*

The author gratefully acknowledges the assistance of Charles Horn of the Administrative Conference staff in conducting interviews. I have benefited greatly from the views of Norman Abrams, Kenneth Davis, Steve Williams, Arthur Bonfield, and David Minge, who read the manuscript, and from the informed criticism of the members of the Committee on Rulemaking and Public Information.

[1] Rev. Rul. 69-545, 1969-2 C.B. 117.

[2] *See* Eastern Ky. Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), *revd. on other grounds*, 96 S. Ct. 1917 (1976), *discussed in* text at notes 145-57 *infra.*

[3] 28 C.F.R. §§ 2.18-.20 (1975). *See* Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1112 (D.C. Cir. 1974), *discussed in* text at notes 120-32 *infra. See generally* Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975).

[4] *See* Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1976), *discussed in* text at notes 82-87 *infra.*

In each case, the agency's failure to involve the public in the formation of its rule had a plausible basis: the exceptions in the APA's rule-making provision for interpretive[6] rules or policy statements.[7] Although interpretive rules of general applicability and general policy statements must be published in the *Federal Register*,[8] the APA sets forth no procedural formalities for their adoption.[9] For purposes of this article, an "interpretive rule" clarifies the meaning of language in statutes or other rules without creating legally binding rights or obligations, and a "policy statement" indicates how the agency will exercise a discretionary function. Both types of administrative pronouncements ("nonlegislative rules")[10] are to be contrasted with administratively enacted "legislative rules,"[11] which prescribe rights or obligations binding on both the agency and the public.

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[5] (a) This section applies, accordingly to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 553 (1970).

[6] Although the APA uses the term "interpretative," the author prefers the word "interpretive" for stylistic reasons. For an example of a statute using the word "interpretive," see Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 57(a)(1)(A) (Supp. V 1975).

[7] *See* 5 U.S.C. § 553(b)(A), (d)(2) (1970).

[8] 5 U.S.C. § 552(a)(1)(D) (1970).

Section I of this article surveys the practices of a selected group of federal agencies in the adoption of interpretive rules and policy statements. It emphasizes the importance of these rules both to members of the public and to the administrative process. Section II analyzes the cases that have considered the APA exemption of interpretive rules and policy statements from preadoption notice and comment procedures. These cases are in disarray for several reasons. For one thing, the bright lines traditionally assumed to distinguish interpretive rules and policy statements from legislative rules have become blurred and indistinct. Moreover, the courts have become sensitive to the public's need to take part in the rule-making process and have increasingly required procedural innovations at the agency level. As section II shows, two inconsistent lines of case law have emerged. In one group of cases, the courts have analyzed the "legal effect" of the rule and have deferred to the agency's own categorization of its rule. In the second group, the courts have concentrated on the practical effect of the rule and have required preadoption procedures for rules that have a "substantial impact" on the public. Unfortunately, the first group of cases fails to give sufficient attention to the public's need to participate in the rule-making process, while the second is difficult to reconcile with the APA and produces unpredictable results. Section III of this article returns to the problem of the distinction between legislative and interpretive rules and emphasizes the increasing irrelevance of the distinction. Finally, section IV proposes a new post-adoption procedure for the formulation of interpretive rules of general applicability and general policy statements. It is hoped that these procedures accommodate the conflicting needs of the public to influence agency nonlegislative rulemaking and of the agency to be free from excessive procedural rigidity.

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[9] For discussion of this exemption, see K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 138-66, 193-205 (1976); Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 AD. L. REV. 101 (1971); Javaras, Krane & Levin, *Public Hearings for Private Rulings: A Dissent*, 50 TAXES 160 (1972); Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047 (1976); Note, *Administrative Law—The Legislative-Interpretative Distinction: Semantical Feinting with an Exception to Rulemaking Procedures*, 54 N.C.L. REV. 421 (1976); Comment, *A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy*, 43 U. CHI. L. REV. 430 (1976) (a particularly thoughtful comment); Comment, *Revenue Rulings and the Administrative Procedure Act*, 1975 WIS. L. REV. 1135.

[10] There is no doubt that both policy statements and interpretive rules are "rules" under the APA. A "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, *interpret*, or prescribe law or policy. . . . " 5 U.S.C. § 551(4) (1970) (emphasis added).

[11] Although the term "substantive rule" appears more frequently in judicial decisions, the author prefers the term "legislative rule." The term "substantive," which implies a distinction from "procedural," is confusing in this context. None of the rules considered in this paper—interpretive rules, policy statements, or legislative rules—are procedural; rather, all relate to substance.

I. The Role of Interpretive Rules and Policy Statements in the Administrative Process

This section of the article summarizes the nonlegislative rule-making practices of four representative federal agencies: the Internal Revenue Service, Immigration and Naturalization Service, Federal Communications Commission, and Federal Trade Commission.[12] This analysis should convey an understanding of the indispensability of interpretive rules and policy statements to effective administration and their enormous practical impact on the public.

A. *Rule-Making Practices of the Federal Agencies*

1. *Internal Revenue Service (IRS)*

In considering the rule-making procedures of the IRS, it is necessary to distinguish between "regulations" and other rules. The familiar IRS regulations[13] seem to be a mixture of legislative and interpretive rules, but this distinction has no procedural importance. The adoption of virtually all new or amended regulations on substantive tax matters is accompanied by prior notice and comment procedures. Thus, appellate courts concerned with the validity of IRS regulations seldom need to decide whether the regulation is legislative or interpretive.

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[12] Some of the material presented in this section is drawn from interviews conducted at the four agencies. Interviews were also conducted with the staffs of six other agencies: the Food and Drug Administration, Federal Power Commission, Wage and Hour Division of the Department of Labor, Occupational Safety and Health Administration, Securities and Exchange Commission, and the United States Board of Parole. For a description of the rule-making practices of these agencies, see my consultant's report to the Committee on Rulemaking and Public Information of the Administrative Conference of the United States.

The interviews covered such matters as the purposes for which interpretive rules and policy statements are used, the procedures used in adopting them, and the staff's attitude toward the desirability of additional procedures. Reference is made to these interviews throughout the article without citation.

[13] Treas. Reg. §§ 1.0-601.702 (1976).

However, the IRS adopts many other nonlegislative rules of general applicability. For example, it issues about 700 revenue rulings each year,[14] which typically apply tax statutes, regulations, or prior rulings to particular facts. These rulings, published in the *Cumulative Bulletin*, are adopted without prior notice or opportunity for public comment and bind the IRS as a matter of policy.[15] Although many rulings seem fairly trivial, others unquestionably have great public impact and most have significance for at least a few taxpayers. For example, the ruling mentioned at the beginning of this article,[16] which established that tax-exempt private hospitals need not give free or below-cost service to the poor, had a great impact on health care delivery. Other particularly important revenue rulings announced the Service's position on the deductibility of prepaid interest[17] and of expenditures for cattle feed,[18] and eliminated the popular educational benefit trust device.[19]

The Service also issues about fifty revenue procedures annually. These appear to be policy statements, since they indicate how the IRS intends to exercise its discretion. For example, a revenue procedure is often used to indicate the circumstances in which the Service will give a favorable private ruling.[20] Since such private rulings are virtually indispensable for certain kinds of transactions, the revenue procedure as a practical matter establishes law. The recent revenue procedures that set ground rules for the use of limited partnerships as tax shelters[21] are prime examples of policy statements that have a large practical impact on private affairs. Finally, the IRS Manual contains interpretive rules and policy statements along with many procedural instructions to the Service's staff.[22]

The interpretive rules and policy statements adopted by the IRS benefit both taxpayers and the agency. They guide IRS personnel in applying the law uniformly to taxpayers all over the country. In addition, by clarifying the law, they reduce the number of inquiries from taxpayers to which the IRS must respond. Finally, they conserve scarce IRS resources by deterring the very kinds of transactions that would most likely be audited and that would probably lead to litigation.

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[14] *See generally* Comment, 1975 WIS. L. REV. 1135, *supra* note 9.

[15] Rev. Proc. 72-1, §§ 6.013-.015, 1972-1 C.B. 694-95. *See generally* Rogovin, *The Four R's: Regulations, Rulings, Reliance, Retroactivity*, 43 TAXES 756 (1956).

[16] *See* text at notes 1-2 *supra* & notes 145-57 *infra* and accompanying text.

[17] *See* Rev. Rul. 68-643, 1968-2 C.B. 76; Andrew Sandor, 62 T.C. 469 (1974), *affd. per curiam*, 536 F.2d 874 (9th Cir. 1976).

[18] Rev. Rul. 73-530, *reissued as* Rev. Rul. 75-152, 1975-1 C. B. 144. *See* Cattle Feeders Tax Comm. v. Shultz, 74-1 U.S. Tax Cas. 83,067 (W.D. Okla.), *revd. on other grounds*, 504 F.2d 462 (10th Cir. 1974).

[19] *See* Rev. Rul. 75-448, 1975-2 C.B. 55.

[20] *See, e.g.*, Rev. Proc. 74-26, 1974-2 C.B. 478.

[21] *See* Rev. Proc. 74-17, 1974-1 C.B. 438; Rev. Proc. 72-13, 1972-1 C.B. 735.

[22] *See* UNITED STATES INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL § 4562.2 (1975) (reasonable cause for filing of returns).

2. *Immigration and Naturalization Service (INS)*

Like the IRS, the INS utilizes preadoption notice and comment procedures when it adds to or alters both legislative and interpretive rules published in the *Code of Federal Regulations*. But it also makes extensive use of policy statements and interpretive rules by issuing annually hundreds of operating instructions to staff.[23] The INS has been gradually increasing the number of its rules that are exposed to prior public comment,[24] but most of the staff instructions are adopted without any public input.

The validity of adopting policy statements and interpretations concerning immigration matters without prior public notice and comment has been frequently litigated. In each case, the rule appears to have had a drastic impact on the affairs of significant numbers of people. One case, referred to at the beginning of this article,[25] involved an INS "operations instruction" concerning the effect of marriage on deportation. Another was a Labor Department field memorandum relating to live-in maids.[26] A third involved a Labor Department directive that revoked a convenient precertification procedure for aliens seeking visas to work in the United States.[27] And a fourth involved an INS rule affecting the exclusion of alien students from the labor certification provisions.[28] Finally, an operations instruction setting forth criteria for voluntary departure and indefinite extensions of voluntary departure[29] has had great practical importance in day-to-day deportation proceedings.

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[23] The Labor Department also issues many instructions and interpretations to guide the INS in administering the provisions relating to labor certification of aliens. They are generally adopted without any prior notice or comment procedures.

[24] The INS personnel interviewed said that the input from the public was often quite helpful to the agency.

[25] *See* Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), *discussed in* text at note 4 *supra* & notes 82-87 *infra* and accompanying text; Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583 (D.N.J. 1975); Dimaren v. INS, 398 F. Supp. 556 (S.D.N.Y. 1974).

[26] *See* Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1038 (1975).

[27] *See* Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972), *discussed in* text at notes 114-19, *infra*.

[28] *See* Hou Ching Chow v. Attorney General, 362 F. Supp. 1288 (D.D.C. 1973).

3. *Federal Communications Commission (FCC)*

While the FCC has long made extensive use of policy statements, it has been inconsistent in inviting public participation.[30] Among the many such FCC pronouncements that have had a dramatic effect on the interests of both licensees and the public are the chain broadcasting report held ripe for review by the Supreme Court in *Columbia Broadcasting System, Inc. v. United States*;[31] a 1965 statement on the criteria for selecting among applicants for a license in a comparative hearing,[32] and a 1970 statement prescribing license renewal criteria.[33] Other policy statements used by the FCC are more innocuous; they may simply be reminders to the industry of new statutes or well-established and noncontroversial points.[34]

FCC staff members claim that policy statements have been used because the policies lacked sufficient definitiveness to be expressed in legislative rules. They deny that the FCC uses the policy statement label to avoid the requirement of public participation or to facilitate subsequent deviations from the statement.[35] Sometimes, however, as in the case of the so-called personal attack rules,[36] legislative rules are employed to announce new policy so that the sanction of statutory forfeiture procedures can be invoked for violation of the rules.[37]

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[29] IMMIGRATION & NATURALIZATION SERVICE OPERATIONS INSTRUCTIONS § 242.10.

[30] For examples of policy statements in which public comments were solicited, see 40 Fed. Reg. 25,689 (1975) (concerning agreements between broadcast licensees and the public); 39 Fed. Reg. 39,395 (1974) (concerning children's television programs); 39 Fed. Reg. 26,371 (1974) (concerning the fairness doctrine and public interest standards).

[31] 316 U.S. 407 (1942).

[32] 1 F.C.C.2d 393 (1965).

[33] 22 F.C.C.2d 424 (1970). *See* Citizens Communications Center v. FCC, 447 F.2d 1201, 1204 n.5 (D.C. Cir. 1971), which suggests in dictum that adoption of this policy statement without public participation might have been invalid.

[34] *Cf.* Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973), involving the FCC's warning to licensees that they should screen recorded music for lyrics that encourage drug use. 31 F.C.C.2d 377 (1971). The court felt that the FCC was simply reminding licensees of an already existing duty.

[35] Professor Tomlinson suggests that one recent FCC decision was in the form of a policy statement rather than a legislative rule so that it could be retroactive. *See* E. Tomlinson, Final Report in Support of Recommendation on Strengthening the Informational and Notice Giving Functions of the Federal Register 33 n.80 (Dec. 31, 1975) (unpublished report for Administrative Conference of the United States).

[36] *See* 47 C.F.R. § 73.123 (1976). These rules were upheld in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[37] *See* 47 U.S.C. § 503(b) (1970); 18 F.C.C. 2d 240 (1969) (FCC's statement on employment nondiscrimination rules).

4. *Federal Trade Commission (FTC)*

In addition to its legislative trade regulation rules, the FTC issues a substantial number of interpretive rules in the form of industry guides.[38] These designate conduct that the FTC believes is unfair or deceptive; they typically have a substantial impact on commercial practices, since businesspersons in the affected industries generally conform to them. The staff puts comparatively little effort into the drafting of interpretive rules, which tend to be relatively vague and comprehensive, unlike legislative rules, which are tightly drawn, very specific, and cover relatively few points. Since 1958, the FTC has adopted industry guides only after giving public notice and inviting comments,[39] and interviews with the agency staff indicated that the comments received were frequently quite helpful.

The new FTC statute clearly distinguishes interpretive and legislative rules.[40] Violation of legislative rules gives rise to liability for steep civil penalties as well as to broad liabilities to the public,[41] but violation of interpretive rules cannot automatically trigger such liabilities.[42] In FTC adjudication, interpretive and legislative rules are sharply differentiated: If a person has violated an interpretive rule, the FTC proceeds under the statute, using the rule as a likely but not a necessary interpretation; but if the respondent has violated a legislative rule, the FTC proceeds under the rule.[43] Thus, adjudication under a legislative rule is considerably less complex than under an interpretive rule, since the agency must determine the meaning of the statute in the latter case. However, in such a case, the agency is almost certain to give great weight to its previously promulgated interpretive rule; it is doubtful therefore that the results of applying legislative and interpretive rules will often differ.

B. *The Interests of Agencies and the Public in Interpretive Rules and Policy Statements*

The preceding discussion of the practices of four agencies illus-

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[38] *See, e.g.*, 16 C.F.R. § 256 (1976) (guides for lawbook industry).

[39] However, the FTC does not invite public comments before issuing its occasional enforcement policy statements, which indicate enforcement priorities for the staff. *See, e.g.*, 16 C.F.R. § 14.9 (1976) (foreign language advertising); 36 Fed. Reg. 12,058 (1971) (substantiation of advertising claims).

[40] *See* Federal Trade Commission Act § 18(a)(1), 15 U.S.C. § 57a (Supp. V. 1975), which distinguishes interpretive rules and policy statements from legislative rules. The elaborate procedures prescribed for the adoption of legislative rules are more detailed than those generally required by the APA.

[41] Federal Trade Commission Act § 5(m), 15 U.S.C. § 45(m) (Supp. V. 1975).

[42] Interpretive rules are explicitly exempted from these provisions. 15 U.S.C. § 45(m)(1)(A) (Supp. V 1975).

[43] *See* 16 C.F.R. § 1.5 (1976).

trates several fundamental points. First, interpretive rules and policy statements are of great importance to the public in alerting them to the agency's position on substantive matters. They frequently have a substantial impact on the affairs of large segments of the public because they definitively affect the behavior of agencies and interested persons or groups. In this respect they differ little from legislative rules.

Second, interpretive rules and policy statements are indispensable to proper administration. Agencies cannot perform effectively unless they clarify the law through interpretive rules and channel their discretion through policy statements. Both kinds of rulemaking are needed to guide the staff in administering the statute and in assisting regulated persons to comply with the law.[44]

Third, a number of agencies now make it their practice to provide notice and comment procedures for many or even most of their generally applicable interpretive rules and policy statements.[45] This practice has become prevalent at some agencies, appears occasionally in others, and is unknown in still others. The trend toward the voluntary use of public participation has been influenced by several considerations. In response to recent cases requiring public participation in the formulation of interpretive rules and policy statements that have a "substantial impact,"[46] personnel at some agencies have decided that the costs of notice and comment procedures are preferable to the uncertainties of litigation. Personnel at other agencies are genuinely convinced of the value of public participation. They believe it produces better rules, increases judicial deference, and enhances the acceptability of the rules to the public. Still, the voluntary use of preadoption procedures is spotty. Unless there is either additional clarification by the courts of the applicable definitional standard or congressional revision of the APA, many agencies will continue to make interpretive rules and policy statements without any public participation at all.

Finally, the interviews at many agencies suggest that agency personnel almost unanimously oppose any statute that would require the standard preadoption notice and comment procedures for most or all interpretive rules and policy statements. The staffs repeatedly stressed that, if followed in good faith, such procedures would seriously delay rulemaking and increase agency costs. Often the public would have nothing useful to contribute, yet a proposed rule could be delayed for many months, during which time uncertainty and confusion would exist. Interviewed agency personnel cautioned that the extra burdens of preadoption procedures would deter the promulgation of interpretive rules and policy statements and would force the agency to find alternative ways to achieve the same result.

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[44] *See generally* E. Tomlinson, *supra* note 35, at 32-57.

[45] For a discussion of the practices of the FCC and the FTC, see text at notes 30-43 *supra*. The Food and Drug Administration, Federal Power Commission, and Securities and Exchange Commission also frequently utilize notice and comment procedures in connection with nonlegislative rulemaking.

[46] *See* notes 108-57 *infra* and accompanying text.

This consensus should counsel caution in espousing a repeal of the present APA exemption for policy statements and interpretive rules. Nevertheless, the present statute excludes the interested and affected public from participation in the formulation of interpretations and policy, except when the agency voluntarily provides notice and comment procedures or a court intervenes. Therefore, a method must be devised that reconciles the justifiable claims of the agencies and the public whom they serve. After analyzing the confused case law in this area, this article will propose a system for postadoption public commentary that offers prospects of reconciling these demands.

II. Judicial Tests Used To Distinguish Legislative and Nonlegislative Rules

Under the APA, legislative and nonlegislative rules must be sharply distinguished, since the Act requires full-fledged notice and comment procedures prior to the adoption of legislative rules but imposes no such requirements upon the adoption of nonlegislative rules.[47] Yet the APA fails to define interpretive rules or policy statements, and, as a practical matter, it is often difficult to distinguish them from legislative rules except by recourse to the agency's label. For example, the FCC adopted a "policy statement" to prescribe the standard of service that a broadcaster must meet in order to have its license renewed[48] but adopted a "legislative rule" to prescribe the equal employment obligations of licensees.[49] Both pronouncements limited the FCC's discretion to decide what is in the public interest and both had a substantial practical impact upon broadcasters, yet the public was invited to participate only in the formulation of the legislative rule.

In recent years, members of the public have claimed that they were entitled to notice and comment before the adoption of a rule labelled by the agency as an interpretive rule or a policy statement. Courts responding to these claims have adopted one of two inconsistent lines of analysis. According to one line of cases, a rule is classified as legislative or nonlegislative on the basis of whether it alters the legal rights or obligations of members of the public. The courts in these cases generally defer to the agency's own categorization of the rule. The standard developed in these cases will be referred to in this article as the "legal effect" test. Courts in the second line of cases pay far less attention to the agency's label or to the legal effect of the rule; instead they decide whether the public was entitled to participate by weighing the public's need to do so. The standard used in these cases will be referred to herein as the "substantial impact" test.

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[47] However, there is no distinction between legislative and nonlegislative rules of general applicability on one important point; all must be published in the *Federal Register*. 5 U.S.C. § 552(a)(1)(D) (1970).

[48] *See* 22 F.C.C.2d 424 (1970).

[49] *See* 18 F.C.C.2d 240 (1969).

A. *The Legal Effect Standard*

The legal effect test is based on the proposition that there exists a fundamental difference in the legal consequences of legislative and nonlegislative agency action. According to this test, legislative rules alter the rights and obligations of members of the public without further action by the agency. Nonlegislative rules, on the other hand, simply describe how the agency intends in the future to interpret law or exercise discretion. Even though nonlegislative rules may have drastic, self-executing effects on behavior, they nevertheless are not "the law." Of course, the most obvious way to ascertain whether a rule affects the public's rights and obligations is to determine how the agency describes its rule; thus the courts rely heavily on the agency's label. But the courts have also been guided by tests suggested by the reports of governmental committees, the legislative history of the APA, and commentators. For purposes of discussion, this section will treat separately the development of the legal effect standard in cases involving policy statements and interpretive rules.

1. *Policy Statements*

A recent Second Circuit decision remarked that the distinction between policy statements and legislative rules had become "enshrouded in considerable smog."[50] In a similar vein, the District of Columbia Circuit thought the distinction was a "fuzzy product."[51] No one who reads the cases that have wrestled with this problem would disagree with these characterizations. Although the complaints are contemporary, the smog and fuzziness have been present from the outset, for it has never been possible clearly to distinguish policy statements from legislative rules.

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[50] Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1976).

[51] Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 37 (D.C. Cir. 1974), *quoting* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 5.01, at 290 (1958). *See* Shapiro,

a. *Tests suggested by committees and commentators.* One early standard under which the two types of rules might be distinguished[52] was offered in the seminal report of the Attorney General's Committee on Administrative Procedure. Recommending that general policy statements be published in the *Federal Register*, the Committee described them this way:

> Most agencies develop *approaches* to particular types of problems, which as they become established, are generally determinative of decisions. . . . As soon as the "policies" of an agency become *sufficiently articulated* to serve as real *guides to agency officials* in their treatment of concrete problems, that fact may advantageously be brought to public attention by publication in a precise and regularized form.[53]

This description is a helpful first effort, but it seems contradictory. What did the Committee mean by "approaches" to problems? If it meant that a policy statement is tentative, rather than definitive, the distinction may be workable. Yet confusion arises from the remainder of the Committee's description, which requires that the policy be "sufficiently articulated to serve as a real guide to agency officials . . . ." If the policy has reached that stage of concreteness, then there may be little to distinguish it from a legislative rule that also guides agency officials and the public.[54]

The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 HARV. L. REV. 921, 930 (1965).

[52] For an interesting early case on a policy statement, see Standard Computing Scale Co. v. Farrell, 249 U.S. 571 (1919). State statutes provided for both a state superintendent and local inspectors of weights and measures. After an investigation, the state superintendent published a "bulletin" in which he said that scales "must" be equipped with a device to compensate for temperature changes. Local inspectors followed the bulletin and refused to "seal" plaintiff's scale, which lacked this device. The Supreme Court held that the "bulletin" was not a "rule" and thus not subject to any constitutional attack. It declared that the opinions and advice of those in authority are not a law or a regulation.

[53] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 26-27 (1941) (emphasis added) [hereinafter cited as ATTORNEY GENERAL'S COMMITTEE REPORT].

[54] The discussion of the dissenting members of the Committee is even less helpful. They proposed that an agency be compelled by statute to formulate and publish a number of items including statements of policy: "Where an agency acting under general or specific legislation, has formulated or acts upon general policies not clearly specified in legislation, so far as practicable such policies shall be formulated, stated, published, and revised in the same manner as other rules." *Id.* at 225. This language was incorporated in the publication requirements of the legislation introduced to implement the Committee's report. *See* S.674, 77th Cong., 1st Sess. § 202(a), 87 CONG. REC. 333 (1941); S.918, 77th Cong., 1st Sess. § 302(b), 87 CONG. REC. 1150

The legislative history of the APA provides little guidance for developing a standard for defining policy statements, although it does provide a clear statement of the rationale for the statutory exemption for nonlegislative rules.[55] Presumably, the APA draftsmen were guided by the rather vague description of policy statements in the Attorney General's Committee report.[56]

The *Attorney General's Manual on the Administrative Procedure Act*[57] noted that general statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency *proposes* to exercise a *discretionary power*."[58] This definition is moderately useful. It uses the word "proposes," which again suggests that a policy statement is tentative rather than definitive. It emphasizes that a policy statement relates to a discretionary power, whereas an interpretive rule construes statutes or rules. Nevertheless, the definition tells little about how to distinguish policy statements from those legislative rules that also address discretionary functions.

Several commentators have proposed tests for identifying policy statements and distinguishing them from legislative rules. Professor Bonfield, for example, has suggested that policy statements are those rules addressed to the staff of the agency rather than to members of the public.[59] Professor Davis, in contrast, argued that the rules should be distinguished largely by reference to the label chosen by the agency.[60] In a recent study for the Administrative Conference of the United States, Professor Tomlinson suggested that policy statements are temporary measures designed to be replaced relatively quickly by more definitive legislative rules.[61] Drawing upon a number of recent cases, still another commentator suggested that, to

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(1941), *quoted in Administrative Procedure: Hearings on S.674, S.675, and S.918 Before a Subcomm. of the Senate Comm. on the Judiciary*, 77th Cong., 1st Sess. 27 (1941) [hereinafter cited as *Hearings*].

[55] *See* S. Doc. 248, 79th Cong., 2d Sess. 18 (1946), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1946, at 18 (1947) [hereinafter cited as APA LEGISLATIVE HISTORY], *quoted in* note 261 *infra*.

[56] *See* note 53 *supra*.

[57] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947). The Manual was written in 1947, one year after the passage of the APA, to explain its purpose and effect to administrative officials.

[58] *Id.* at 30 n.3 (emphasis added). The District of Columbia Circuit accorded this definition "considerable weight because of the very active role the Attorney General played in the formulation and enactment of the APA." Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974).

[59] *See* Bonfield, *supra* note 9, at 115.

[60] K. DAVIS, *supra* note 9, at 148.

[61] *See* E. Tomlinson, *supra* note 35, at 50. For a similar view, see K. DAVIS, DISCRETIONARY JUSTICE 102 (1969).

determine which rules concerning discretionary functions should be considered legislative rules, courts must analyze the substantiality of a rule's effect on the public, the extent to which the public would have a subsequent opportunity to influence the agency, the extent to which public comment would help the agency, and considerations of agency efficiency.[62]

b. *Judicial definitions.* The first significant case to address the problem of identifying policy statements was *Airport Commission of Forsyth County v. CAB*,[63] which involved the requirement that general policy statements be published in the *Federal Register*. The Civil Aeronautics Board and the Federal Aviation Administration jointly issued a press release setting forth a new policy concerning the centralization of airline routes into a single airport serving several cities. However, the press release was not published in the *Federal Register*, seemingly a clear-cut violation of section 3 of the APA.[64] In an unpersuasive opinion, the Fourth Circuit held that publication was not required, observing that the press release did not set forth a rule that the public was required to obey or with which it had to avoid conflict. This test proved helpful to later courts seeking to distinguish policy statements from legislative rules through analysis of the legal effect of the rule.

A panel of the District of Columbia Circuit adopted the *Forsyth County* analysis in the important 1974 case of *Pacific Gas & Electric Co. v. FPC*.[65] The FPC required pipeline companies to file plans establishing priorities during periods in which gas deliveries were to be curtailed. The submitted plans reflected a wide range of views on whether curtailments should occur according to the relative efficiencies of the end use of the gas or according to prior contractual commitments. Consequently, the FPC issued Order 467, which it called a policy statement, explaining that curtailments should occur according to a detailed priority list based on the efficiency of the end use of the gas. There was no public participation in the formulation of Order 467, and the court held that none was required.[66]

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[62] *See* Comment, 43 U. Chi. L. Rev. 430, *supra* note 9.

[63] 300 F.2d 185 (4th Cir. 1962).

[64] Section 3(a)(3) of the APA explicitly required publication of "statements of general policy or interpretations of general applicability formulated and adopted by the agency for the guidance of the public." Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946). Although the language is different, the requirements of the current version of the statute are the same. 5 U.S.C. § 552(a)(1)(D) (1970). *See* E. Tomlinson, *supra* note 35, at 47-48.

[65] 506 F.2d 33 (D.C. Cir. 1974). *Accord*, Pacific Lighting Serv. Co. v. FPC, 518 F.2d 718 (1975).

[66] *See* 506 F.2d at 38.

In reaching its decision, the court first spoke of the appropriate role of policy statements in the administrative process. Policy statements, it observed, are anterior to both rulemaking and adjudication; like press releases, they announce policy the agency hopes to implement in future rulemaking or adjudication. The publication of policy statements permits public dissemination of the agency's policies prior to actual application in particular situations and facilitates long-range planning within the affected industry.

Turning to the problem of characterizing the rule, the court relied on the *Forsyth County* test. It noted that a policy statement does not establish a binding norm or make a final determination of any issues or rights. The agency cannot apply or rely upon it as law and must be prepared to support the policy when it is applied as if the statement had never been issued.[67] Applying these principles, the court determined that Order 467 had no final, inflexible impact upon the petitioners. Deferring to the agency's characterization and description of its action, the court noted that it had been consistently described as a policy statement. The court also found it significant that the order expressly envisaged future proceedings. It emphasized as well the right of interested parties in subsequent adjudications to challenge or support the policy through factual or legal presentations.[68] The FPC declared that the order prescribed only initial guidelines as a means of facilitating curtailment planning and the adjudication of cases. Indeed, the court went out of its way to establish that Order 467 would not even shift the burden of proof in subsequent curtailment cases and that the burden would remain on the pipeline company.[69]

The decision reached in *Pacific Gas & Electric* seems correct if the standard for analysis is the legal effect of the policy statement. Application of the factors suggested by the Attorney General's Committee report, prior cases, and commentators seems to suggest, on the whole, the same result reached by the court:

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[67] *See* 506 F.2d at 38.

[68] *See* 506 F.2d at 40-41.

[69] *See* 506 F.2d at 43. The court could easily have held that Order 467 shifted the burden of proof in subsequent proceedings to customers. Transwestern Pipeline Co., 50 F.P.C. 343 (1973), *affd. sub nom.* Pacific Lighting Serv. v. FPC, 518 F.2d 718 (9th Cir. 1975), involved customers who protested the priority system generally as well as the specific curtailment priorities. The FPC refused to order a hearing under section 4 of the Act, 15 U.S.C. § 717c(e) (1970), which would have given the pipeline company the burden of proving the reasonableness of its plan, and instead ordered a hearing under section 5, 15 U.S.C. § 717d (1970), which gave the challengers the burden of proof. 50 F.P.C. at 344. Thus, *Transwestern* could easily be read to indicate that Order 467 shifted the burden of proof and that the FPC had little interest in any prompt reconsideration of the matter. But the *Pacific Gas & Electric* court brushed *Transwestern* aside. *See* 506 F.2d at 43 n.28.

(1) the order did not set forth a rule that the public must obey;

(2) the FPC had consistently labelled the order as a policy statement;

(3) the order used many tentative words, which suggests it was a policy statement, although it was not clear whether the order was permanent or temporary;[70]

(4) it was not clear whether the statement was directed at the FPC staff or at the public; and

(5) aggrieved persons would have subsequent administrative proceedings in which they could seek to change the agency's policy.[71]

The discussion in *Pacific Gas & Electric* on the practical effect of Order 467 is disappointingly thin. The court alluded to *Columbia Broadcasting System, Inc. v. United States*,[72] in which a policy statement drastically impaired a network's contracts and organization, but said the "effect of Order 467 in the present case is not so direct or immediate"[73] because there was no present abrogation of contractual commitments. Such commitments would be affected only after actual curtailment plans were filed and approved by the FPC, and even then "[t]he possibility that petitioners might receive a lower curtailment priority at some future time as the result of a subsequent tariff filing does not compare with the significant and immediate impact of the regulations in *Columbia Broadcasting*."[74]

Admittedly, the effect of Order 467 was not as drastic as that of the policy statement in *Columbia Broadcasting*. But surely the impact of a policy statement should not have to reach that level of severity before adversely affected parties are given the right to pre-adoption participation. Order 467 had an immediate effect on all gas customers who had contractual commitments for deliveries, but low priorities, and who had every reason to take the FPC's pronouncement seriously. The chance of obtaining a waiver in subsequent proceedings would have appeared to them to be extremely slight.[75] Consequently, low priority customers had to begin an immediate search for alternative energy sources, to negotiate long-range commitments for other fuels, and to purchase equipment for burning them. All this might well impair profits and affect a vast range of investment decisions. Moreover, authoritative guidance from the FPC was absolutely imperative for the pipeline companies, since FPC approval of a plan abrogating existing contracts might be a defense to contractual liability in state courts.

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[70] These tests are suggested by Professors Bonfield and Tomlinson. *See* text at notes 59-61 *supra*.

[71] *See* text at note 62 *supra*.

[72] 316 U.S. 407 (1942).

[73] 506 F.2d at 42.

[74] 506 F.2d at 42.

[75] A subsequent case, Consolidated Edison Co. v. FPC, 512 F.2d 1332 (D.C. Cir. 1975), *noted in* 17 B.C. INDUS. & COM. L. REV. 260 (1976), revealed that Order 467 would have an immediate effect. Both customers and pipeline companies who wished to continue interim plans that did not comply with Order 467 were summarily rejected by the FPC; thus, it was clear that filings in compliance with Order 467 would be accepted and all others would be suspended.

The court also held that it had no jurisdiction to review Order 467 substantively[76] since the Order was not ripe for review under the two criteria set forth in *Abbott Laboratories v. Gardner*.[77] First, it had no immediate and significant impact on petitioners because it was tentative. There was no assurance that the Order would, in fact, be imposed on each customer and pipeline, and thus any attending hardships seemed remote. Second, the issues were not then deemed suitable for judicial review because there was no meaningful record. The contracts that were to be abrogated, for example, were not in the record. The court's analysis of the ripeness question is unsatisfactory. The fact that Order 467 did not have a binding legal impact on petitioners should not have been the sole criterion on the hardship issue. In several cases, practical business harm, together with reasonable assurances that the policy would not be reconsidered, has been considered a sufficient hardship.[78] The lack of a record is a far more serious objection; indeed, the court would have had considerable difficulty reviewing Order 467 since the FPC's basis for adopting it was never disclosed.[79] There was neither public comment, nor a statement of basis and purpose, nor any of the usual helpful material used in reviewing rulemaking.[80]

Pacific Gas & Electric clearly shows the inadequacy of the present statute and the legal effect test. Order 467 cried out for public participation, since great economic issues turned on it, and, as a practical matter, it was definitive. For that same reason, moreover, immediate judicial review should have been available, yet the absence of a record made it infeasible.[81]

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[76] Jurisdiction depended upon a statute that allowed review to "any party to a proceeding [who is] aggrieved by an order . . . ." 15 U.S.C. § 717r(b) (1970). Although the petitioners were considered "parties to a proceeding," Order 467 was held not to be an "order" under the statute. The court conceded that "order" includes both rules and adjudicative orders, and concluded that the standards for identifying an "order" should be the same as those used for deciding ripeness. 506 F.2d at 46-48.

[77] 387 U.S. 136 (1967).

[78] *See, e.g.*, National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971); text at notes 219-29 *infra*.

[79] *See* 17 B.C. INDUS. & COM. L. REV. 260, *supra* note 75, at 280 & n.216.

[80] For a discussion of the standards applied in judicial review of rulemaking, see Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

In 1975, a panel of the Second Circuit applied the legal effect test in *Noel v. Chapman*.[82] Noel was an alien residing in New York whose deportation had been ordered. He applied for and received the privilege of voluntary departure but failed to leave. He then married a resident alien and applied for an indefinite extension of voluntary departure. The effect of his marriage was to exempt him from the requirement of labor certification, but not to give him a preference over other Western Hemisphere aliens seeking visas. In essence, the indefinite extension he sought would have allowed him to remain with his wife until a visa became available.

Voluntary departure can be granted to a deportable alien at the discretion of the Attorney General.[83] By regulation, this authority is lodged within the sole discretion of the various district directors of the Immigration and Naturalization Service (INS).[84] Between 1968 and 1972, these directors followed markedly different policies in granting indefinite extensions to deportable aliens who had married resident aliens; the New York director had been particularly generous. Because of the adverse impact of indefinite extensions on the labor market, congressional pressure was exerted on the INS to be stricter about granting them. Consequently, the INS instructed all district directors that, as of July 31, 1972, such aliens should not routinely be granted extensions and that relief should be afforded only where warranted by compelling circumstances. On April 10, 1973, the instruction was amended in part so that the former New York policy would be applied nationwide. Unfortunately for Noel, however, the revised instruction applied only to marriages occurring before April 10, 1973. Noel's marriage occurred three days too late, so he was not within the scope of the amendment.

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[81] The *Pacific Gas & Electric* court made a dubious but intriguing observation related to the scope of judicial review of policy statements. The court pointed to the great deference accorded legislative rules by reviewing courts, and explained that this was the result of the public's role in formulating them. For discussion of the scope of judicial review accorded legislative rules, see text at notes 192-207 *infra*. But a policy statement adopted without public participation is fundamentally different, and its underlying wisdom may be reassessed by the reviewing court. *See* 506 F.2d at 40. This suggests that if a policy statement were adopted with public participation, the scope of its judicial review would be sharply narrowed. This dictum seems erroneous. If the agency has made a nonlegislative rule, plenary judicial review is appropriate, regardless of the procedural formalities attending its formulation. A narrow scope of review is appropriate only when the agency is exercising delegated legislative power. However, the degree to which the public participated could appropriately be considered by the court as one factor in deciding what deference it should pay to the agency's expertise. *See* text at notes 214-15 *infra*.

[82] 508 F.2d 1023 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1976).

[83] *See* 8 U.S.C. § 1254(a) (1970).

[84] *See* 8 C.F.R. § 244.2 (1975).

Noel sought to have the instructions declared a legislative rule and therefore invalid for want of preadoption public notice and comment. Remarking that the distinction between policy statements and legislative rules was "enshrouded in considerable smog," the court agreed with the INS that they were policy statements, primarily because they imposed no obligation on the public.[85] The court was influenced by Professor Bonfield's view that policy statements are typically directed at the agency staff rather than at the public. If the criteria for assessing the legal effect of the rule are considered, however, it is unclear whether the court reached the correct result, since the criteria point in opposite directions:

(1) the INS instructions did not set forth a standard that the public had to obey, which suggests they amounted to a policy statement;

(2) the label given to the instructions was consistent with treating them as a policy statement;

(3) there was nothing tentative about the instructions, and they seemed permanent rather than temporary, which suggests they were a legislative rule;

(4) the instructions were directed at the staff, not the public, which suggests they were a policy statement; and

(5) aggrieved persons would have no opportunity to change the view of the personnel who were responsible for making the deportation decision because the instructions definitively forebade the staff from granting automatic extensions—a characteristic suggestive of a legislative rule.

The court recognized that several other courts had required public participation in the formulation of rules that have a "substantial impact." But it declared that there could be no substantial impact without a change in "existing rights or obligations," which it found lacking in the case before it.[86] As we shall see, however, the substantial impact cases do not require a change in *legal* rights or obligations. On the contrary, they turn on the presence of substantial *practical* impact.

Even if the *Noel* court were correct in its reading of the substantial impact cases, however, the INS instructions seem to have had an effect on the legal rights of individuals like Noel. To be sure, no alien ever had a legal right to require the district director to exercise discretion favorably to him. Yet the established practice in New York where

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[85] 508 F.2d at 1030.

[86] 508 F.2d at 1030.

Noel lived had been routinely to grant indefinite extensions of deportation to married aliens. Before the agency terminated this practice for deportable aliens married after a certain date, marriage meant an indefinite extension, whereas afterwards marriage no longer sufficed. A valuable status initially created by administrative action had now been destroyed, in a manner and with an effect that surely resembles a change in legal rights. Moreover, unlike the persons adversely affected by the rules in *Forsyth County* and *Pacific Gas & Electric*, aliens such as Noel had no effective opportunity to protest the automatic application of INS policy in their cases. It would, therefore, have been wholly defensible for the court to have labelled the INS instructions a legislative rule even under the traditionally defined legal effect test.[87]

2. *Interpretive Rules*

Interpretation is a vital administrative function that consists of clarifying the meaning of statutes, prior regulations, case law, or other law-declaratory material.[88] One important interpretive technique is the adoption by an agency of interpretive rules of general applicability. Interpretation also frequently occurs in the course of adjudication and through legislative rulemaking, as well as in less formal communications such as press releases, internal memoranda, or advice letters to members of the public.[89]

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[87] If the definition of the phrase "general applicability and legal effect" provided in the regulation relating to the Federal Register Act were applied, the instructions in *Noel* might be considered to have had "legal effect." The phrase is defined as "any document issued under proper authority prescribing a penalty or course of conduct, *conferring* a right, *privilege*, authority, or *immunity*, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organization." 1 C.F.R. § 1.1 (1975) (emphasis added). If the word "withdrawing" were substituted for "conferring," it would appear that the instructions in *Noel* indeed had "legal effect." By definitively altering the way in which a discretionary power could be exercised, the INS seems to have withdrawn a "privilege" or an "immunity."

It is also of some interest that the INS personnel interviewed thought that the instruction in *Noel* had a substantial practical impact on a significant class of aliens. This conclusion was shared by immigration lawyers who favor public participation in the making of INS instructions. Whether public participation would have served a useful purpose in the *Noel* situation, however, is uncertain. *See* Comment, 43 U. Chi. L. Rev. 430, *supra* note 9, at 451-53 (a useful analysis of situations in which public participation is likely to produce helpful information for the agency). It is not clear, for example, how much the INS would have benefited from public exposure of the issues underlying the rule, such as the bona fides of marriages of deportable aliens, the impact of departure extensions on the labor markets, and the duration of the wait for visas. Certainly it is arguable that public debate would have been useful because the INS instruction had been the product of political concern over the competition for jobs between citizens and aliens that had been aggravated by a tight labor market. *Compare* Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971) (oral argument required in rulemaking because of suspicion that agency favored domestic over foreign producers), *with* Consolidated Edison Co. v. FPC, 512 F.2d 1332 (D.C. Cir. 1975) (FPC's procedure that screened out public acceptable because its action apparently not favorable to regulated industry).

Other cases involving policy statements in which the legal effect test apparently was applied are Hunter v. Morton, 529 F.2d 645 (10th Cir. 1976) (alternative ground); Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir.) *cert. denied*, 414 U.S. 914 (1973); Memphis Light, Gas & Water Div. v. FPC, 462 F.2d 853 (D.C. Cir.), *cert. denied*, 409 U.S. 941 (1972), *revd. on other grounds*, 411 U.S. 458 (1973) (semble); Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583 (D.N.J. 1975); Dimaren v. INS, 398 F. Supp. 556 (S.D.N.Y. 1974).

Consciousness of the difference between legislative and interpretive rules began to appear in the literature in the late 1920s.[90] Early administrative law writers had no difficulty making the distinction. Legislative rules were deemed to be those promulgated pursuant to a *specific* statutory delegation of rule-making power. For example, a statute might prohibit a certain action, if so provided in rules, or it might permit such action, except as provided in administratively enacted rules. Rules that were not based on a specific statutory delegation of power were considered interpretive.[91]

The writers of the 1941 report of the Attorney General's Committee on Administrative Procedure shared this understanding.[92]

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[88] *See generally* M. ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES 80-82 (1973).

[89] Interpretation can also occur through less formal means, such as informal adjudication, negotiation, speechmaking, dispensing of grants, and even the lifting of the administrative eyebrow.

[90] *See* J. COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES ch. 5 (1927); F. VOM BAUR, FEDERAL ADMINISTRATIVE LAW 475-89 (1942); Alvord, *Treasury Regulations and the Whilshire Oil Case*, 40 COLUM. L. REV. 252 (1940); Lee, *Legislative and Interpretative Regulations*, 29 GEO. L.J. 1 (1940).

[91] *See* ATTORNEY GENERAL'S COMMITTEE REPORT, *supra* note 53, at 27; Lee, *supra* note 90.

[92] ATTORNEY GENERAL'S COMMITTEE REPORT, *supra* note 53, at 27.

The Committee discussed the legal attributes of interpretive rules:

> Most agencies find it useful from time to time to issue interpretations of the statutes under which they operate. These interpretations are ordinarily of an advisory character, indicating merely the meaning of applicable statutory language. They are not binding upon those affected, for, if there is disagreement with the agency's view, the question may be presented for determination by a court. But the agency's interpretations are in any event of considerable importance; customarily they are accepted as determinative by the public at large, and even if they are challenged in judicial proceedings, the courts will be influenced though not concluded by the administrative opinion. An agency's interpretations may take the form of "interpretative rules." More often they are made as a consequence of individual requests for rulings upon particular questions; but as "rulings" they are often scattered and not easily accessible.

Id.

While the Committee thus characterized legislative and interpretive rules differently, it was aware that these distinctions are often difficult to preserve in application:

> In addition to the power to enact legally binding regulations conferred upon many of the agencies, all of them may, if they wish, issue interpretations, rulings or opinions upon the laws they administer, without statutory authorization to do so. . . . Some agencies which issue interpretations couched in general terms rather than rulings upon particular facts are careful to distinguish them from regulations that have the force of law; other agencies simply promulgate their

However, their discussion also indicated a keen awareness of both the practical impact of interpretive rules and the deference paid to them by reviewing courts. The majority of the Committee favored the publication of all rules in the *Federal Register* but refrained from recommending specific procedures for rulemaking, partly because of concern that excessive hearings would be required when they were not needed.[93] When Congress returned to the task of prescribing uniform administrative procedures in 1946, it enshrined the difference between legislative and interpretive rules in the APA,[94] with the legislative history appearing to suggest an intent to adopt the legal effect test.[95]

> interpretations as regulations which are indistinguishable in form from those that have statutory force.
>
> Administrative rulemaking, in any event, includes the formulation of both legally binding regulations and interpretative regulations. The former receive statutory force upon going into effect. The latter do not receive statutory force and their validity is subject to challenge in any court proceeding in which their application may be in question. The statutes themselves and not the regulation remain in theory the sole criterion of what the law authorizes or compels and what it forbids. An interpretative regulation even of long standing will be rejected if it is deemed to be in conflict with a clear and ambiguous statute.
>
> The distinction between statutory regulations and interpretative regulations is, however, blurred by the fact that the courts pay great deference to the interpretative regulations of administrative agencies especially where these have been followed for a long time. . . . Although the courts at times avoid the effect of this doctrine by refusing to apply administrative interpretations which they consider inadmissible, the doctrine has sufficient weight to give much finality to the interpretative regulations of administrative agencies. Consequently, the procedures by which these regulations are prescribed become important to private interests and will be considered in this report.

Id. at 99-100 (footnotes omitted).

[93] *Id.* at 108. Nevertheless, it strongly approved the various practices of consultation, conferences, and hearings that had developed by 1941. *Id.* at 103-08. The Committee recommended that all rules having "statutory effect" have a deferred effective date. *Id.* at 115. The minority members of the Committee would have required notice and comment procedures for all rules, legislative and interpretive. *Id.* at 228. In the legislative hearings that followed submission of the Report to Congress, there was relatively little discussion of the problem of interpretations. The testimony of Commissioner Healy of the SEC also indicates considerable confusion on the part of the Committee members. *See* Hearings, *supra* note 54, at 330.

[94] It created a number of exemptions in addition to the one for nonlegislative rules. For an excellent critique of some of the other exemptions, see National Wildlife Fedn. v. Snow, 39 Ad. L.2d 705 (D.C. Cir. 1976); Bonfield, *Military and Foreign Affairs Function Rulemaking Under the Administrative Procedure Act*, 71 MICH. L. REV. 222 (1972); Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits or Contracts*, 118 U. PA. L. REV. 540 (1970). The Administrative Conference recommended repeal of these exemptions. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS 69-8, 73-5 (1976).

[95] The Judiciary Committee staff contended that there was no need to require procedural formalities for the adoption of interpretive rules since these are subject to plenary judicial review, whereas substantive rules are accorded maximum deference. *See* APA LEGISLATIVE HISTORY, *supra* note 55, at 18. During the Senate debate, Senator McCarran stated that there was no need for any special provision for interpretations since they are "merely adaptations [or] interpretations of statutes" and subject to a more intensive judicial review." *Id.* at 313.

Many judicial decisions have since weighed claims that the public should be allowed to participate in the formulation of rules that the agency asserts are interpretive under section 4 of the APA. Some of these cases involve agency interpretations of statutes, while others involve interpretations of prior rules. The cases that utilize the legal effect standard analyze the rule to determine whether it creates, by its own force, a legally binding standard of conduct. Highly relevant in this inquiry, of course, is the agency's chosen label.

A frequently cited case of this type is *American President Lines, Ltd. v. Federal Maritime Commission.*[96] According to the federal Shipping Act,[97] carriers can form a conference to establish uniform rates on the shipment of particular items. To deal with competition from nonparticipating carriers, the conference would "open" the rate on a particular item to competition. After a period of time, it would "close" the rate, thereby restoring uniformity. However, section 14b of the Shipping Act[98] posed a problem: If a conference "terminated" a contract rate system, it had to give ninety days notice of such action and could not reinstitute the rate without permission from the Federal Maritime Commission (FMC).

The FMC, without public participation, adopted a rule construing section 14b. The rule provided that the temporary "opening" of a rate was a "termination" under the Act that required ninety days notice, and that the "opened" rate could not be closed again without the FMC's permission. Carriers claimed the rule was invalid because the agency had failed to comply with section 4 procedures. In an opinion by Judge (now Chief Justice) Burger, the District of Columbia Circuit had little difficulty in characterizing the rule as interpretive, largely deferring to the label affixed by the agency. The court found persuasive the fact that the FMC had treated the rule as interpretive by denying that the rule had any "independent binding effect on carriers, and [by asserting that] the only penalties for action contrary to the rule are those penalties which were applicable before promulgation of the rule and independent of the rule, i.e., the penalties provided for violation of the Shipping Act itself."[99] The court adhered to the legal effect approach even though

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A last helpful piece of commentary is the authoritative ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 57, at 30 n.3, which defines interpretive rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."

[96] 316 F.2d 419 (D.C. Cir. 1963).

[97] 46 U.S.C. §§ 801-842 (1970).

[98] 46 U.S.C. § 813(a) (1970).

[99] 316 F.2d at 421-22. The court also held that the petitioner's objection to the lack of public participation was moot. 316 F.2d at 421.

it admitted that the rule would have significant practical impact:

> [T]his rule undeniably deals with a matter of great importance to petitioners' business activities . . . .
>
> . . . Whatever practical or psychological effect this rule may have on the conduct of petitioners—and we do not doubt that it may have some pragmatic consequences—its legal effect is essentially that of an opinion of the legal staff. Neither the affected parties nor the courts are bound by it unless they elect to adopt it as a correct interpretation of the statute.[100]

Frequently, a rule purports to interpret an earlier one. If the later rule only clarifies the earlier rule without amending it, no public participation is required.[101] If, however, the later rule amends the earlier one, APA rule-making procedures are obligatory.[102] It is quite difficult to determine whether a prior rule has actually been amended or merely interpreted. The leading case applying the legal effect test in this situation is *Gibson Wine Co. v. Snyder*.[103] At issue in *Gibson Wine* was a regulation that required wine derived from a particular fruit to be designated by the name of that fruit. The issue concerned boysenberry wine; since the boysenberry is a variety of blackberry, was boysenberry wine to be labelled as "blackberry wine" or "boysenberry wine"? After considerable vacillation, the deputy commissioner of the Internal Revenue Service finally ruled that it had to be labelled as "boysenberry wine." This ruling was particularly disadvantageous to bottlers of boysenberry wine, who protested that wines made from other varieties of blackberries could be labelled "blackberry wine." Plaintiff argued that this ruling was an amendment to the existing regulation, thereby requiring public participation under both the APA and a specific provision of the Intoxicating Liquor Law.[104]

The District of Columbia Circuit held that no public participation was required, since the rule was interpretive rather than legislative. The court used the legal effect test, remarking that legislative rules create law whereas interpretive rules state what the administrator thinks the law means. Since the ruling was merely the agency's opinion as to the meaning of an existing regulation, it was held to be interpretive in nature. The court observed that interpretations receive a more intensive degree of judicial scrutiny than legislative rules, noted that the lower court had provided plenary review, and affirmed its holding that the interpretation was substantively correct.[105]

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[100] 316 F.2d at 421-22. Other cases that employ the legal effect test in analyzing the interpretive rule issue include Pesikoff v. Secretary of Labor, 501 F.2d 757, 763 n.12 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974); United States v. 353 Cases, 247 F.2d 473 (8th Cir. 1957), *cert. denied*, 358 U.S. 834 (1958).

[101] If the subsequent rule is only interpretive of the earlier one, the later rule could be retroactive. *See* Fleming v. Van Der Loo, 160 F.2d 906, 913 (D.C. Cir. 1947). However, it would be substantively invalid if it was inconsistent with the earlier rule. *See* Barron Coop. Creamery v. Wickard, 140 F.2d 485, 488 (7th Cir. 1944).

[102] Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974).

[103] 194 F.2d 329 (D.C. Cir. 1952), *noted in* 1 J. PUB. L. 491 (1952).

[104] 27 U.S.C. § 205(f) (1970).

Judge Miller, in dissent, argued that the prior regulation was completely changed by the subsequent ruling. Previously all wine made from varieties of blackberry was permitted to be labelled blackberry wine; now the agency had created a special category for one "large and luscious" variety. He felt that this ruling could not be interpretive because the earlier rule was clear and did not need any interpretation. He added that the ruling had the force and effect of law[106] and also seemed to feel that due process considerations were involved.[107]

B. *The Substantial Impact Test*

In sharp contrast to the cases that distinguish between legislative and nonlegislative rules according to their legal effect are cases that consider the pragmatic effect of the rule determinative. It is not always clear from these cases whether the courts are rejecting the legal effect test as a definitional tool, or whether they accept it but require that notice and comment procedures be employed in the interest of fairness. Although the substantial impact cases are responsive to the public's need to participate in rulemaking, they furnish little predictable guidance to an agency that must decide what procedures to employ. In addition, the courts using the test have failed to explain how it is consistent with the language of section 4.

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[105] *See* 194 F.2d 332-33.

[106] *See* 194 F.2d at 335 (Miller, J., dissenting). Presumably, Judge Miller meant that the subsequent rule was legislative, and, therefore, by definition, it had the force of law. It is also possible that he meant that the ruling had the force of law in a practical sense, since the sanctions for violations were sufficiently severe to induce compliance. If so, his opinion is a precursor of the substantial impact test that emerged twenty years later.

[107] *See* 194 F.2d at 336 (Miller, J., dissenting). Other cases that classify subsequent regulations as interpretive, largely by reference to the agency's label, are Reeves v. Simon, 507 F.2d 455 (Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975) (dictum); Shell Oil Co. v. FPC, 491 F.2d 82 (5th Cir. 1974); National Assn. of Ins. Agents, Inc. v. Board of Governors of Fed. Reserve Sys., 489 F.2d 1268 (D.C. Cir. 1974); Garelick Mfg. Co. v. Dillon, 313 F.2d 899 (D.C. Cir. 1963); Mitchell v. Edward S. Wagner Co., 217 F.2d 303 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); National Restaurant Assn. v. Simon, 411 F. Supp. 993 (D.D.C. 1976). *But see* Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974) (subsequent regulation classified as legislative despite its label, since it changed obligations of a regulated company).

1. *Policy Statements*

The foundation of the substantial impact test was laid in *Texaco, Inc. v. FPC,*[108] in which the court's discussion of policy statements was tangential to its holding. In that case, suit was brought to challenge a Federal Power Commission (FPC) regulation amended without public participation to require compound interest rather than simple interest on refunds. To justify its lack of public procedures, the FPC first relied on the APA provision that permits an agency to dispense with notice and comment procedures if they are "unnecessary,"[109] but the court held this exemption was inapplicable. As an apparent afterthought, the agency tried to characterize its rule as a policy statement. This position was doomed to defeat since the agency's own conduct was inconsistent with it.[110] In analyzing this claim, the court first defined a policy statement in traditional terms—as "one that does not impose any rights and obligations on an operator."[111] Using this test, the court held that the amendment was not a policy statement since it imposed a new obligation for the payment of compound interest on refunds, one which an operator would have the burden of proving should not apply in any waiver or similar proceeding.[112]

It was, however, the ensuing discussion of the values of public participation in rulemaking that was seized upon by subsequent courts. According to the court, notice and comment procedures give the public an opportunity to participate and enable the agency to educate itself "before establishing rules and procedures which have a *substantial impact* on those regulated."[113] But the *Texaco* court did not use the substantial impact test to determine that the compound interest rule was not a policy statement. Instead, the phrase was dropped in connection with a general treatment of the importance of public participation in rulemaking.

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[108] 412 F.2d 740 (3d Cir. 1969).

[109] *See* 5 U.S.C. § 553(b)(3)(B) (1970) ("when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

[110] The regulation was not placed with the agency's interpretations and policy statements in the *Code of Federal Regulations.* The agency had never relied on the policy statement exception, and the court felt that its review power was limited to testing the validity of the theory used by the agency. *See* 412 F.2d at 744 nn.8 & 9. Moreover, the compound interest rule seemingly was not a policy statement, since it did not relate to a discretionary function. It would have been more plausible to characterize it as an interpretive rule, since it explains the meaning of the word "interest" in section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) (1970).

[111] 412 F.2d at 744.

[112] *See* 412 F.2d at 743-44. The court apparently felt that a new obligation was imposed by reason of a shift of the burden of proof. *See* text at notes 65-69 *supra.*

[113] 412 F.2d at 744 (emphasis added). The court apparently drew support from National Motor Freight Traffic Assn. v. United States, 268 F. Supp. 90, 95 (D.D.C. 1967) (three-judge court), *affd. per curiam,* 393 U.S. 18 (1968), which referred to the

The substantial impact analysis was elevated from dictum to doctrine in *Lewis-Mota v. Secretary of Labor.*[114] In order to issue a visa for permanent residence, the Secretary of Labor must certify that there is a shortage of domestic workers in the alien's trade and that his admission will not adversely affect the wages and working conditions of similarly employed American workers. To simplify the determinations involved, the Secretary published Schedule C, which listed occupations for which labor was in short supply and which was to be reviewed continuously. Aliens in the trades listed in Schedule C could be "precertified," meaning that they were excused from having to submit a specific job offer to receive a visa. Various versions of Schedule C were adopted with public participation under the APA, but the schedule was revoked by a directive on February 9, 1970, without any public participation. Plaintiffs were persons who had been precertified under the prior procedure, but whose visas had not yet been granted. In order to retain their priority after Schedule C was revoked, plaintiffs had to submit specific job offers; since they failed to do so, their labor certification was revoked.

The court had no difficulty characterizing the Secretary's directive as a rule rather than "a fact determination regarding the domestic labor market," as the district court had found.[115] The Secretary then argued that the rule was procedural, interpretive, or a policy statement, and therefore exempt from APA rule-making procedures. The court noted that labels were not conclusive and applied the same test to all three claims:

> [The rule] changed *existing rights and obligations* by requiring aliens of the class of appellants to submit proof of specific job offers as well as a statement of their qualifications; it thereby made it more difficult for employers to fill vacancies in the occupations no longer precertified. By virtue of this *substantial impact* both upon the aliens and the employers, notice and opportunity for comment by the public should first be provided.[116]

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impact of a rule in deciding whether it fell within the APA exception for procedural rules.

[114] 469 F.2d 478 (2d Cir. 1972). Judge Hays dissented without a written opinion.

[115] *See* 479 F.2d at 481, *quoting* 337 F. Supp. 1289, 1294 (S.D.N.Y. 1972). The court held that the directive fit the definition of a rule in the APA as "an agency statement of general or particular applicability and future effect designed to implement . . . law or policy. . . ." 5 U.S.C. § 551(4) (1970).

[116] 469 F.2d at 482 (emphasis added). The court relied on *Texaco,* cases con-

It is not at all clear from this language whether the court found the rule procedurally invalid under the legal effect test, or whether it rejected the legal effect test in favor of the substantial impact test and found the rule invalid under the latter.

The confusion in the Second Circuit's decision is particularly striking when compared to the carefully reasoned decision of the district court.[117] The district judge pointed out that, while precertification at the time of application for the visa was a convenient procedure, the statute requires an analysis of the American labor market at the time of the alien's admission. Since the Secretary had no power to guarantee admission through precertification, the procedure could be considered a policy statement, a practice without legal effect, or an invalid legislative rule, any of which could be revoked without public participation.

The decision of the Second Circuit took an entirely different tack. It observed that the directive changed existing rights and obligations. This could not be correct, however, since, as the district court had shown, precertified aliens had no legal right to admission and the Secretary had no obligations toward them. Evidently, therefore, the court of appeals was concerned less with legally defined rights and obligations than with the practical effect of the revocation on the interests of both employers and alien employees. The Secretary had definitively terminated an advantageous status involving a substantial class of persons. Under the prior practice, precertified alien employees were protected from the burden of having to obtain and prove a specific job offer, both at the time of application for a visa and at the time of admission. Now they were no longer protected. Whether Schedule C and its revocation ever created or abolished any legal rights or obligations was obviously not determinative.

Lewis-Mota is well worth comparing with *Noel v. Chapman*, decided by a different panel of the Second Circuit in 1975, which also involved discretionary immigration determinations.[118] The *Noel* panel recognized the existence of the "substantial impact" test, but, quoting *Lewis-Mota*, it remarked that "ordinarily" the only rules that have a substantial impact are those that change "existing rights and obligations."[119] As we have seen, however, the rule in *Lewis-Mota* did not affect legal rights and obligations; rather it changed a status

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struing the procedural exemption, and *Pharmaceutical Manufacturers, discussed in* text at notes 133-38, which involved interpretive rules.

[117] 337 F. Supp. 1289 (S.D.N.Y. 1972).

[118] *See* text at notes 82-87 *supra*.

[119] 508 F.2d at 1030, *quoting* Lewis-Mota v. Secretary of Labor, 469 F.2d at 482.

of great practical importance. The instruction in *Noel*, which prevented the routine extension of deportation for a particular class of deportable aliens, operated in a like fashion. Thus, the two rules had similar practical effect, and those two Second Circuit immigration decisions appear to be sharply inconsistent.

The substantial impact test was forthrightly adopted by a panel of the District of Columbia Circuit in *Pickus v. United States Board of Parole*.[120] The parole board adopted rules concerning the criteria to be considered in granting parole.[121] Later it formulated more specific guidelines that prescribed the number of months customarily to be served before release, depending on the severity of the crime and the characteristics of the offender.[122] Although the rules and the guidelines were published in the *Federal Register*, they were adopted without public participation.

After finding that the Board of Parole is an agency covered by the APA,[123] the court held that neither the rules nor the guidelines could be treated as policy statements. Consequently, both were invalid.[124] The court registered its agreement with "several courts [that] have ruled that agency action cannot be a general statement of policy if it substantially affects the right of persons subject to agency regulations . . . . [The] outer boundary of the general policy exemption derives from congressional purpose in enacting section 4—that the interested public should have an opportunity to participate, and the agency should be fully informed, before rules having such substantial impact are promulgated."[125] Although the court spoke of "the rights of persons," the balance of its opinion made clear that it was speaking not of "rights" in the strict sense, for no prisoner has a "right" to parole, but rather of a "substantial effect on ultimate parole decisions,"[126] or "significant consequences."[127]

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[120] 507 F.2d 1107 (D.C. Cir. 1974). *Accord*, Ramer v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975) (Bureau of Prisons). *See* Pickus v. United States Bd. of Parole, 543 F.2d 240 (D.C. Cir. 1976) (subsequent decision denying prisoners right to comment orally on the rules).

[121] 28 C.F.R. § 2.20 (1975).

[122] 28 C.F.R. §§ 2.18-.19 (1975). *See generally* Project, *supra* note 3.

[123] 507 F.2d at 111-12. According to staff of the Board of Parole, the Board's reason for contesting the *Pickus* case was its concern over whether the Board should be classified as an agency under the APA. It feared that an unfavorable precedent on this point might result in exposure of its quasi-judicial functions to the adjudication provisions of the APA. The Board was relatively unconcerned with whether the rule-making requirements of the APA were applicable to it. It has had little difficulty in complying with the *Pickus* decision.

[124] *See* 507 F.2d at 1114. The court declared that this holding was not retroactive. Therefore, invalidly adopted regulations were allowed to determine the parole status of many prisoners. *But see* Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944), *discussed in* note 237 *infra* and accompanying text.

[125] 507 F.2d at 1112. The court relied on *Texaco* and *Lewis-Mota*, as well as on cases construing the procedural exemption. *See* National Motor Freight Traffic Assn. v. United States, 268 F. Supp. 90 (D.D.C. 1967) (three-judge court), *affd.*, 393 U.S. 18 (1968); Seaboard World Airlines, Inc. v. Gronouski, 230 F. Supp. 44 (D.D. C. 1964).

If the court had chosen to do so, it could easily have followed the traditional analysis of cases like *Pacific Gas & Electric*[128] to characterize both the rules and the guidelines as policy statements:

(1) the rules did not set forth a standard that the public must obey;

(2) the agency generally labelled them as policy statements and guidelines, although sometimes they were called rules;

(3) the orders used many tentative words and appeared to be temporary in duration;

(4) they were directed at the agency staff, not at the public; and

(5) aggrieved persons could try to persuade decisionmakers not to apply the rules in particular cases.

It seems clear that the *Pickus* decision squarely rejects the traditional legal effect test; instead, it distinguishes between legislative rules and policy statements by analyzing the practical effect of the rule.[129] Under this approach, if the public should have been involved in the formulation of the rule, it follows that the rule is to be deemed legislative.

The *Pickus* decision reached a sound result. The rules and guidelines enunciated by the United States Board of Parole had indeed sharply altered the discretionary powers of parole board decisionmakers. Considering the Board's massive caseload, the rules will, in effect, be dispositive in the great majority of cases. It follows that prisoners and other members of the public should have been involved in their promulgation. However, the reasoning of *Pickus* is open to serious criticisms. Most importantly, the court overlooked the fundamental point that the parole board had no legislative rule-making power.[130] Consequently, its rules and guidelines could not be legislative rules. Moreover, the court simply failed to explain how its decision could be reconciled with the legislative history of section 4 of the APA, which seems to embrace the legal effect test.[131] As will be explained later in this article, the sound result in *Pickus* could have been achieved without doing violence to the statute.[132]

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[126] 507 F.2d at 1112-13.

[127] 507 F.2d at 1113.

[128] *Pacific Gas & Electric*, decided only four months before by a different panel of the D.C. Circuit, is discussed in text at notes 65-81 *supra*.

[129] Other decisions have applied substantial impact analysis to rules that the agency sought to characterize as policy statements. *See, e.g.*, Citizens Communications Center v. FCC, 447 F.2d 1201, 1204 n.5 (D.D. Cir. 1971) (dictum); Nader v. Butterfield, 373 F. Supp. 1175 (D.D.C. 1974) (FAA memorandum permitting x-ray checks of baggage).

[130] *See* K. DAVIS, *supra* note 9, at 150-54; Koch, *supra* note 9, at 1065. Both

2. *Interpretive Rules*

An influential case applying the substantial impact test to a rule that interpreted a statute is *Pharmaceutical Manufacturers Association v. Finch*,[133] decided in 1970. The 1962 amendments to the Food, Drug and Cosmetic Act[134] require that manufacturers establish by "substantial evidence" the "effectiveness" both of new drugs and of those marketed between 1938 and 1962. The statute defines substantial evidence to mean "adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved. . . ."[135]

In 1969, without public participation, the Food and Drug Administration (FDA) adopted a regulation[136] that purported to interpret the language of this statute. In addition to prescribing criteria for "adequate and well-controlled clinical investigations," the rule provided that other clinical tests and documented clinical experience were irrelevant. Moreover, the affected drug company would be entitled to a hearing only if it demonstrated in advance a likelihood that it could produce substantial evidence of the drug's effectiveness.

Plaintiff brought an action contending that the rule was invalid because of the agency's failure to provide preadoption notice and comment procedures. The FDA argued that the rule was both interpretive and procedural, but the court effectively disposed of both contentions. Refusing to be bound by the agency's labels, the court noted that the underlying policy of section 4 "at least requires that when a proposed regulation of general applicability has a substantial impact on the regulated industry, or an important class of the mem-

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authors further criticize *Pickus* for applying the standard of judicial review applicable to legislative rules.

[131] *See* text at notes 52-58, 90-95 *supra*.

[132] *See* text at notes 174-76 *infra*.

[133] 307 F. Supp. 858 (D. Del. 1970).

[134] Federal Food, Drug and Cosmetic Act §§ 505(d)-(e), 21 U.S.C. §§ 355(d)-(e) (1970).

[135] 21 U.S.C. § 355(d) (1970).

[136] 34 Fed. Reg. 14,596 (1969).

bers or the products of that industry, notice and opportunity for comment should first be provided."[137] The court then analyzed in detail the immediate and substantial impact of the regulation on the drug industry and found that:

(1) the regulations were *pervasive* in scope, applying to thousands of drugs;

(2) the regulations had a *retroactive* effect since they threatened drugs already on the market;

(3) the FDA's position substantially narrowed its previous, more flexible stance on the issue, and thus it represented an important *change in position*; and

(4) the regulation caused substantial *confusion* in the industry, was extremely *complex*, and was intensely *controversial.*[138]

The substantial impact test has also been applied to rules that purport to interpret previously adopted rules. These decisions depart sharply from the legal effect test embraced in the *Gibson Wine* case discussed earlier.[139] One such case is the Eighth Circuit decision in *American Bancorporation v. Board of Governors of the Federal Reserve System.*[140] The Bank Holding Company Act prohibits a bank holding company from acquiring an interest in a nonbanking organization unless the Federal Reserve Board determines that the new business is "so closely related to banking . . . as to be a proper incident thereof."[141] A regulation, adopted after notice and comment, listed certain activities that the Board considered closely related to banking. A provision of that regulation permitted a holding company to act "as investment or financial adviser, *including* (i) serving as the advisory company for a mortgage or a real estate investment trust, and (ii) furnishing economic or financial information."[142]

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[137] 307 F. Supp. at 863. The court relied on *Texaco, see* text at notes 108-13 *supra*, which primarily involved the "unnecessary" exemption, as well as cases involving the "procedure" exemption, *e.g.*, National Motor Freight Traffic Assn. v. United States, 268 F. Supp. 90 (D.D.C. 1967) (three-judge court), *affd.*, 393 U.S. 18 (1968) (per curiam). Similar exemption cases, also cited by the court, are NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) ("procedure" exemption), and Seaboard World Airlines v. Gronouski, 230 F. Supp. 44 (D.D.C. 1964) ("agency management" exception).

Professors Koch and Davis read *Pharmaceutical Manufacturers* as requiring additional rule-making procedures because of a perceived need for fairness, as distinguished from constituting a reclassification of the rules as legislative. *See* K. DAVIS, *supra* note 9, at 196-97; Koch, *supra* note 9, at 1062. The language employed by the court is vague and is fairly susceptible to either reading. However, as Koch concedes, the court did rely on *National Motor Freight*, which clearly used the substantial impact test.

[138] *See* 307 F. Supp. at 864-66. Other cases that utilize substantial impact analysis to decide whether a rule is interpretive are Lewis-Mota v. Secretary of Labor, *discussed* in text at notes 114-19 *supra*; Cattle Feeders Tax Comm. v. Shultz, 74-1 U.S. Tax. Cas. 83,067 (W.D. Okla), *revd. on other grounds*, 504 F.2d 462 (10th Cir. 1974).

[139] *See* text at notes 103-07 *supra.*

[140] 509 F.2d 29 (8th Cir. 1974). *See* Note, *supra* note 9.

[141] Bank Holding Company Act § 4(c)(8), 12 U.S.C. § 1843 (c)(8) (1970). For another case in which a second regulation interpreted an earlier one under this statutory scheme, see National Assn. of Ins. Agents, Inc. v. Board of Governors of Fed. Reserve Sys., 489 F.2d 1268 (D.C. Cir. 1974).

Northwest Bancorporation (Banco) applied for permission to acquire a firm that specialized in advising state and local governments on financial matters. After the application was filed, the Board amended its regulation without public participation to allow holding companies to act "as investment or financial adviser *to the extent of* . . . providing financial advice to state and local governments."[143] Relying on the amended rule, the Board approved Banco's application.

The Eighth Circuit found the adoption of the second rule valid since it had no substantial impact on the competitors of Banco. The court's major reason for this conclusion was that, by substituting the language "to the extent of" for "including," the second rule had *narrowed* the original regulation, thereby making it more difficult for bank holding companies to expand. Additionally, the court pointed out that the entire subject matter had been fully canvassed in the initial rule-making hearings. Under the analysis first suggested in *Pharmaceutical Manufacturers*, the second regulation seemed neither complex nor pervasive, did not drastically change existing law, seemed to cause no confusion or controversy, and had no significant retroactive effect.[144]

C. *The Tests Clash*: Eastern Kentucky Welfare Rights

The divergent streams of analysis exemplified by the legal effect and substantial impact tests finally intersected in *Eastern Kentucky Welfare Rights Organization v. Simon*,[145] resulting in a six to three split in the District of Columbia Circuit. The case involved an attack on the validity of Revenue Ruling 69-545,[146] which interpreted the word "charitable" in a tax provision[147] exempting charitable organizations from income tax. In this ruling, the IRS reversed itself, expressly abrogating an earlier ruling[148] that had conditioned the tax-exempt status of a private hospital on its provision of free or below-cost medical treatment to indigents. As is customary for published rulings, the IRS did not provide for public notice and comment for either ruling.[149] The district court upheld the plaintiff's substantive attack on the second ruling,[150] without reaching the issue of whether it was invalid under the APA for lack of public participation.

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[142] 36 Fed. Reg. 10,777 (1971) (emphasis added).

[143] 12 C.F.R. § 225.4(a)(5) (1976) (emphasis added).

[144] An additional portion of the opinion remanded the case for a trial-type hearing on adjudicatory facts involved in Banco's application.

Other cases that apply substantial impact analysis to determine whether a second regulation is interpretive or legislative are Continental Oil Co. v. Burns, 317 F. Supp. 194 (D. Del. 1970); Anderson v. Butz, 37 Ad. L.2d 852 (E.D. Cal. 1975).

[145] 506 F.2d 1278 (D.C. Cir. 1974), *revd. on other grounds*, 96 S. Ct. 1917 (1976). The Supreme Court held that the complaint should have been dismissed because the plaintiffs lacked standing to sue.

[146] 1969-2 C.B. 117.

The court of appeals reversed, holding that the ruling was not contrary to congressional intent. It also disagreed with plaintiff's procedural argument. Adopting the traditional legal effect test, the majority concluded that the ruling was interpretive and that notice and comment procedures were not required. Because the rule interpreted the meaning of the word "charitable" in the statute, the court was not bound by the ruling, although it might choose to accept the ruling as a proper interpretation.[151]

In a footnote, the court confronted the substantial impact test. It recognized the impact of the ruling on the poor, the Service's lack of expertise concerning the problem of medical care delivery, and the Service's sharp reversal of position, but concluded: "[W]hile these factors have been considered by the courts with respect to whether notice and hearing are required by the APA, they are not determinative here where a ruling is clearly interpretative in nature and has no legally binding effect."[152] This footnote is disingenuous; the cases relying on the substantial impact test used it even though a rule was clearly interpretive of words in a statute or regulation and even though it had no legally binding effect.[153] Thus, the majority did not distinguish the substantial impact test but rather squarely rejected it.

In dissent on this point, Judge Wright observed that, while the ruling portended a substantial change in the availability of hospital services for the poor, neither the poor nor anyone else was given notice or allowed to comment. He pointed out that the IRS is not expert in health care delivery problems and that, consequently, experts in this field should have assisted the IRS in reaching an informed decision whether to relax the obligations of private hospitals to the poor.[154]

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[147] I.R.C. § 501(a), (c)(3).

[148] Rev. Rul. 56-185, 1956-1 C.B. 202.

[149] However, the IRS has recently invited public comment and provided for deferred effectiveness in regard to a proposed revenue procedure. Announcement 75-42, 1975-19 I.R.B. 138. Revenue procedures relate to IRS policy and discretion or provide procedural instructions, while revenue rulings interpret the tax code.

[150] *See* 370 F. Supp. 325 (D.D.C. 1973).

[151] *See* 506 F.2d at 1290. The court relied on *Gibson Wine, discussed in* text at notes 103-07 *supra.*

[152] 506 F.2d at 1291 n.30.

[153] *See* text at notes 133-44 *supra.*

Rehearing en banc was denied, although Judges Wright and Robinson and Chief Judge Bazelon voted for it. Chief Judge Bazelon's brief opinion pungently criticized the use of the legal effect test, since the majority had failed to make a de novo examination of the substantive issues involved but had merely deferred to the agency. As he put it,

> [T]he majority tells the plaintiffs that it will not be bound by the [IRS] interpretation of the term "charitable" and then turns right around and upholds the Service interpretation as a permissible exercise of discretion on the basis of factual assumptions which are not supported by a record and which plaintiffs have not had an opportunity to rebut.[155]

The majority probably was correct in characterizing the ruling as an interpretive rule under traditional legal effect analysis. IRS rulings make no definitive changes in the tax law; they have always been treated by the agency as interpretive and courts often grant them remarkably little deference.[156] In one important respect, however, a ruling like Revenue Ruling 69-545 is different from most revenue rulings. Generally, a ruling unfavorable to taxpayers is unlikely to have any legal effect, and taxpayers have ample opportunity to challenge it before the agency as well as the courts. But Revenue Ruling 69-545 is *favorable* to the taxpayer and unfavorable to poor persons needing hospital services. Those adversely affected will have no opportunity to persuade the IRS that its ruling was incorrect, for there will be no subsequent administrative proceedings, since they are not adversely affected as taxpayers. Indeed, in its decision in *Eastern Kentucky*, the Supreme Court held that the poor persons challenging the ruling lacked standing to obtain judicial review. Under these circumstances, it could be argued that a revenue ruling that will not be subject to any further administrative proceedings might have sufficient legal effect to be characterized as a legislative rule.

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[154] *See* 506 F.2d at 1291-92.

[155] 506 F.2d at 1293 (footnotes omitted).

[156] *See, e.g.*, Stubbs, Overbeck & Assoc., Inc. v. United States, 445 F.2d 1142 (5th Cir. 1971); Grace E. Lang, 64 T.C. 404 (1975). For a case according some deference to revenue rulings, see Gino v. Commissioner, 538 F.2d 833 (9th Cir.), *cert. denied*, 97 S. Ct. 490 (1976). *See* Comment, 1975 WIS. L. REV. 1135, *supra* note 9, at 1140 n.34

If substantial impact is the test, however, it would be difficult to find a clearer case in which public participation should be mandatory.[157] The Service's ruling apparently had a profound effect on the availability of health care for poor people, it amounted to a complete reversal of the Service's previous position, the matter was highly controversial, and the IRS was functioning in an area where it had no expertise.

D. *A Critique of Present Case Law*

As we have seen, the courts have fashioned two dissimilar methods of determining if the agency must give notice and invite comments before adopting what the agency considers to be an interpretive rule or a policy statement. The legal effect approach generally yields more predictable results and is more solidly grounded in the APA. The substantial impact test is more responsive to the public's need to participate in the formulation of important rules, but it is rather unpredictable and lacks an adequate statutory basis.

Although the legal effect test usually furnishes predictable results, this is not always so.[158] Many policy statements, for example, arguably have legal effect because they confer or withdraw a "privilege" or an "immunity."[159] If a policy statement assures a favorable or unfavorable exercise of agency discretion, does it not confer or withdraw a privilege or an immunity? If so, it would seem to have the requisite legal effect and thus should properly be treated as a legislative rule. Moreover, the other factors sometimes used in applying the legal effect test are not particularly helpful. Distinctions based on tentativeness or temporariness are elusive, and a rule might be addressed either to the staff or to the public without any real difference in impact.[160] Furthermore, it is difficult to classify a rule by making judgments about the adequacy of subsequent administrative redress.

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[157] One impact of the ruling was that it aborted congressional consideration of the issue. *See* 506 F.2d at 1289.

[158] For example, even if the traditional legal effect test is adopted, it is difficult to determine how the FCC's 1970 policy statement on license renewal criteria should be classified. Although labelled as a policy statement, it appeared to work a definitive and permanent change in renewal proceedings. Similarly, the policy statement on children's television appears to impose new obligations on licensees. *See* 39 Fed. Reg. 39,395 (1974).

[159] *See* 1 C.F.R. § 1.1 (1976).

[160] Many discretionary rules can be directed to either the staff or the public. For example, many of the policy statements of the CAB are directed to airlines or cities but could just as easily have been addressed to the staff. *See, e.g.*, 14 C.F.R. §§ 399.11, 399.45, 399.80 (1976). The FPC rule involved in *Pacific Gas & Electric*, *see* text at notes 65-81 *supra*, which set priorities for natural gas allocations, could easily have been an instruction addressed to pipeline companies on how to allocate the gas. It could also have been a directive to the staff concerning the acceptance

Similarly, it is frequently difficult to decide whether a rule that construes particular statutory language is interpretive or legislative.[161] As will be discussed more completely in the next section of this article,[162] generalized rule-making power in the statute is sufficient to confer the authority to adopt legislative rules. Moreover, the agency may have neglected to label the rule, and it may not be clear whether the agency views the rule as binding on the public. Interpretive rules are usually neither tentative nor temporary. Finally, even if their effect on regulated parties is subject to a probably illusory administrative reconsideration, their effect on others, such as consumers or competitors, may be definitive and virtually unreviewable.[163]

In situations where a rule interprets a prior rule, there is no intelligible way to ascertain whether the prior rule has been amended or only modified. Of course, if the two are wildly inconsistent, it is fairly obvious that the second rule was an amendment. More typically, however, the second rule introduces new and perhaps unexpected classifications, distinctions, or emphases in the first rule.[164] Whether the first rule has been changed or only interpreted cannot be determined in a principled manner.

Moreover, the traditional test relies to an unacceptable degree on the label used by the agency. Yet that label might have been chosen precisely for the purpose of avoiding public participation, permitting retroactivity,[165] or discouraging preenforcement judicial review.[166] We have been cautioned not to place excessive reliance on labels,[167] and that warning is particularly appropriate when the

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of filings. By the same token, many legislative rules relating to discretionary matters seemingly could have been written as instructions to staff rather than to the public. *See, e.g.*, Johnson's Professional Nursing Home v. Weinberger, 490 F.2d 841 (5th Cir. 1974).

[161] *See, e.g.*, 39 Fed. Reg. 20,723 (1974) (FCC notice respecting access by political candidates to prime time); Baird, *Prospective Interpretative Rule-Making by the SEC*, 25 Bus. L. 1581, 1603-09 (1970).

[162] *See* text at notes 178-91 *infra.*

[163] The rule in *Eastern Ky. Welfare Rights* was of this nature. *See* Independent Broker-Dealers' Trade Assn. v. SEC, 442 F.2d 132, 140 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971).

[164] *See* Yellow Transit Freight Lines, Inc. v. United States, 221 F. Supp. 465 (N.D. Tex. 1963) (three-judge court) (judges disagreed sharply over whether the second rule constituted an amendment or merely an interpretation of the prior rule).

[165] *See* text at notes 233-53 *infra.*

[166] *See* text at notes 192-218 *infra.*

[167] *E.g.*, Columbia Broadcasting Sys. v. United States, 316 U.S. 407 (1942); Independent Broker-Dealers' Trade Assn. v. SEC, 442 F.2d 132, 140-41 (D.C. Cir.),

issue is the opportunity for those affected by the rule to contribute to its formulation.[168]

Unlike the traditional analysis, the substantial impact test is attentive to the need for public participation. Its approach is straightforward: the public should participate in the making of rules that have a substantial impact on its interests. It does not matter whether the interest damaged or enhanced is a legal right or obligation; it could be a status, an expectation, or a business or personal practice or relationship.

However, the substantial impact test suffers from the serious defect of unpredictability of result.[169] Much depends upon the strength of a plaintiff's claim that the rule has a substantial impact on himself and others similarly situated. Also significant is the court's intuition as to whether the litigant is playing an obstructionist role or can make a worthwhile contribution in the formulation of the rule. Some courts have employed a collection of factors in determining the substantiality of the impact of a rule, such as the rule's complexity, the pervasiveness of its impact, the degree of controversy surrounding it, the seriousness of its retroactive effect,[170] the abruptness of change in the agency's position, or the agency's need for instruction and guidance. Each of these factors is vague and can be readily manipulated.[171]

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cert. denied, 404 U.S. 828 (1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). As Chief Justice Warren once wrote, "[h]ow simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of labels pasted on them!" Trop v. Dulles, 356 U.S. 86, 94 (1958). ***But see*** K. DAVIS, *supra* note 9, at 148.

[168] For example, all of the rules adopted by agencies that have no rule-making power, such as the EEOC, are, by definition, interpretive or policy statements. The public is never entitled to participate in any of the rulemaking of these agencies, no matter how critical the rules are in implementing the statutory scheme.

[169] Professor Koch suggests that courts might require agencies to use whatever pre- or postadoption procedures the court finds appropriate in the interests of fairness. *See* Koch, *supra* note 9, at 1066-68. In my view, this proposal magnifies the unpredictability of the substantial impact test. It is probably better to require the agencies to observe the section 4 procedures, rather than a tailor-made procedure, if its nonlegislative rules have a substantial impact.

[170] If a rule is more likely to be legislative if it has retroactive effect, an interesting anomaly is presented. Generally, under the traditional analysis, interpretive rules were retroactive and legislative rules were prospective. *See* text at notes 233-53 *infra*. Thus a retroactive rule is likely to be classed as interpretive by a court using traditional analysis but as legislative by a court using substantial impact analysis.

[171] A recent commentary attempts to synthesize the factors that a court should consider in assessing substantial impact. *See* Comment, 43 U. CHI. L. REV. 430, *supra*, note 9. The author focuses on the need to protect outsiders, the extent to which they will have subsequent opportunities to challenge the rule, the extent to which the agency could utilize public input, and considerations of administrative ef-

The substantial impact test also contains a flaw considerably more fundamental than unpredictability. The cases applying the test have utterly failed to explain how it is consistent with section 4 of the APA. The history of the nonlegislative rule exemption of the APA indicates that Congress shared the understanding of contemporaneous commentary[172] that drew the distinction in terms of legal effect. The difference between legislative rules on the one hand and interpretive rules and policy statements on the other was well understood in 1946. Whether a rule was legislative depended upon whether it was binding on the public, not upon its practical effect. Unfortunately, the decisions that define non-legislative rules by an assessment of their impact on the public have supplied no analysis of the consistency of that test with the APA. As a consequence, the substantial impact test, in its present form, seems an unlikely candidate to survive Supreme Court review.[173]

Nevertheless, the legislative history of the nonlegislative rule exemption does supply a solid foundation for use of the substantial impact test as a method of assuring fair procedures rather than as a definitional tool. It admonishes the agencies that they were not precluded from using notice and comment procedures and emphasizes that, on the contrary, they could utilize such procedures at their discretion. As the Senate Judiciary Committee noted:

> Agencies are given discretion to dispense with notice (and consequently with public proceedings) in the case of interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. This does not mean, however, that agencies should not—where useful to them or helpful to the public—undertake public procedures in connection with such rule-making.[174]

This legislative history provides fertile soil in which the substantial impact test could take root. It suggests that an agency should not treat all of its nonlegislative rules alike. Instead, it should decide in each case whether public participation is desirable. Such partici-

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ficiency. However, the vagueness of these factors diminishes the usefulness of this analysis.

[172] *See* notes 52-58 and 90-95 *supra* and accompanying text.

[173] *See* K. Davis, *supra* note 9, at 193-95; Koch, *supra* note 9. Both Professors Koch and Davis criticize the substantial impact text as a definitional tool. An interpretive rule or policy statement that has a substantial impact does not become a legislative rule for that reason. But both authors agree with the results of the substantial impact cases, viewing them as attempts by courts to impose extra-statutory procedural requirements on the agencies in the interests of fairness. Koch argues that the courts should design an appropriate procedure tailor-made for each case. *See* Koch, *supra* at 1065-67. In addition, see Independent Broker Dealers' Trade Assn. v. SEC, 442 F.2d 132, 144 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971).

[174] *See* APA Legislative History, *supra* note 55, at 187.

pation would be particularly appropriate when the agency staff knows, or has reason to know, that the procedures might significantly protect the public and educate the agency. In short, preadoption procedures should be used whenever the rule would have a substantial impact upon an appreciable segment of the public.[175] If the agency failed to provide notice and comment procedures, despite the fact the rule would have a substantial impact on the public, a court could readily find the omission reversible error. Its holding would not be that the rule was legislative despite its lack of legal effect but rather that the agency's chosen rule-making procedure amounted to an abuse of discretion. This abuse could be rectified by the courts in the same way they correct other reviewable abuses of discretion—that is, by identifying the abuse and creating an appropriate remedy. The remedy could include abrogating the rule until notice and comment procedures have been observed, or leaving it in effect and requiring postadoption procedures.[176]

In many situations, it would not be an abuse of discretion for the agency to omit preadoption procedures even though the rule would have a substantial impact on the public. For example, emergency conditions might require immediate action. Even if the rule were legislative, the agency could appropriately dispense with the section 553 procedure by making a "good cause" finding that they were "unnecessary, impracticable, or contrary to the public interest."[177] In such situations, the reviewing court would surely hold that the omission of these procedures was not an abuse of discretion.

III. BLURRING THE LINE BETWEEN INTERPRETIVE AND LEGISLATIVE RULES

As we have seen, the APA rule-making provisions require that courts and agencies draw a sharp distinction between interpretive and legislative rules. According to traditional theory, this distinction is easily made and has a number of significant consequences. But recent developments of fundamental significance in administrative law have begun to make the distinction more difficult to draw and increasingly irrelevant. These developments parallel, and seem consistent with, the cases that have required agencies to provide notice and comment procedures before adopting interpretive rules that have a substantial impact.

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[175] Recommendation 76-5, adopted by the Administrative Conference of the United States on December 9-10, 1975, is in agreement with this position. For the text of this and other suggestions in Recommendation 76-5, see note 266 *infra.*

[176] *Cf.* National Assn. of Independent Television Producers & Distribs. v. FCC, 502 F.2d 249 (2d Cir. 1974), in which an FCC legislative rule providing for an eight-month pre-effectiveness period was held arbitrary and unreasonable. A longer pre-effectiveness period was required, even though the APA only sets forth a minimum period of 30 days. *See* 5 U.S.C. § 553(a) (1970). Similarly, it might be argued that, although the APA exemptions generally allow interpretive rules and policy statements to be adopted without any public participation, the absence of such procedures would be arbitrary and unreasonable when a rule is likely to have a substantial impact.

[177] 5 U.S.C. § 553(b)(B) (1970).

A. *The Power To Make Legislative Rules*

The expansion of agency power to promulgate legislative rules is a development of extraordinary importance in administrative law. It has left in utter shambles the comfortable notion[178] that interpretive and legislative rules are easy to distinguish by examination of an agency's rule-making power. The traditional view was that a legislative rule could be adopted only pursuant to a *specific* statutory delegation of authority. Rules made pursuant to general rule-making powers were automatically deemed interpretive. Today, however, it is universally accepted that agencies can adopt legislative rules pursuant to general rule-making powers.

For many years, the Supreme Court has been generous in its construction of agency rule-making powers.[179] Similarly, the agencies have consistently been upheld when they have adopted rules that circumvented adjudicatory hearings required by statute.[180] The most striking example of the broad construction of general rule-making powers is the case of the Federal Trade Commission (FTC). The statute establishing the FTC contained only a general rule-making power buried among its procedural and investigatory provisions,[181] and for many years the agency conceded that it had no power to make legislative rules. Indeed, the legislative history of the FTC statute seemed to establish rather convincingly that Congress meant to deny the FTC such power, intending that it rely solely on adjudication to flesh out the contours of "unfair or deceptive acts or practices" and "unfair methods of competition."[182] Stung by criticism of its ineffectiveness, the FTC finally decided that it had authority to adopt legislative rules.[183] Judicial affirmation of this claim would furnish a significant procedural advantage to the Commission, for it could then proceed against a respondent for violation of a rule rather than the statute and thereby preclude relitigation of the underlying factual and policy basis of the rule. The FTC's power to adopt legislative rules was ringingly upheld by the District of Columbia Circuit in *National Petroleum Refiners Association v. FTC*, and certiorari was denied.[184]

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[178] *See* ATTORNEY GENERAL'S COMMITTEE REPORT, *supra* note 53, at 27; Lee, *supra* note 90.

[179] *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[180] *See, e.g.*, FPC v. Texaco, Inc., 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[181] Federal Trade Commission Act, ch. 311 § 6(g), 38 Stat. 722 (1914) (current version at 15 U.S.C. § 46(g) (Supp. V 1975)).

[182] Shapiro, *supra* note 51, at 960.

A similar development occurred in connection with the rulemaking of the Food and Drug Administration (FDA). The FDA has many clear grants of legislative rule-making authority[185] and also has a general rule-making power under section 701(a) of its organic statute.[186] For many years, it was not clear whether section 701(a) conferred legislative rule-making power.[187] Although the point had been canvassed by the lower courts,[188] the Supreme Court, in *Abbott Laboratories v. Gardner*,[189] seemed to assume that regulations adopted under section 701(a) were legislative, and passed on to its landmark analysis of ripeness. Recently, the Second Circuit squarely confronted the issue.[190] It noted that attempts to draw a hard and fast line between legislative and interpretive regulations had been rather unrewarding because the line of demarcation is far from clear. But the court recognized that if the administrative process is to be effective, specific regulations under general statutory delegations of power have to be treated as authoritative, regardless of whether they are labelled legislative or interpretive, especially in areas where the agency possesses expertise not shared by the courts. Where once it might have demanded proof of specific delegation of legislative rule-making authority, the court stated that it had learned from experience to accept a general delegation of power as sufficient in certain areas of expertise.[191]

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[183] Earlier, the FTC had adopted a middle course. In the famous cigarette labeling opinion in 1964, the FTC investigated the economics of the tobacco industry and the hazards of smoking. It adopted an interpretive rule requiring health warnings, and declared that it would take official notice of the results of its investigation in subsequent adjudications against noncomplying cigarette manufacturers. *See* 29 Fed. Reg. 8324 (1964). However, there was doubt whether the FTC could preclude relitigation of the factual bases of its interpretive rule. *See* K. DAVIS, *supra* note 51, § 5.04, at 258-63 (Supp. 1970); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 491-96 (1970); Shapiro, *supra* note 51, at 964-68.

[184] National Petroleum Refiners Assn. v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

[185] *See, e.g.*, 21 U.S.C. § 341 (1970).

[186] Federal Food, Drug, and Cosmetic Act § 701(a), 21 U.S.C. § 371(a) (1970).

[187] *See* Forte, *The GMP Regulations and the Proper Scope of FDA Rulemaking Authority*, 56 GEO. L.J. 688 (1968). *See generally* Cody, *Authoritative Effect of FDA Regulations*, 24 FOOD, DRUG & COSMETICS L.J. 195 (1969); Shapiro, *supra* note 51, at 967-71.

[188] *See* Abbott Laboratories v. Celebreeze, 352 F.2d 286 (3d Cir. 1965), *revd.*, 387 U.S. 136 (1967) (regulations held to be interpretive); Toilet Goods Assn. v. Gardner, 360 F.2d 677, 686-87 (2d Cir. 1966), *affd.*, 387 U.S. 158, 167 (1967) (irrelevant whether regulations are deemed interpretive or legislative).

[189] 387 U.S. 136, 151-52 (1967).

[190] National Nutritional Foods Assn. v. Weinberger, 512 F.2d 688 (2d Cir. 1975).

In light of this trend, a theoretical distinction between legislative and interpretive rules assumed to be present by Congress when it approved the APA has been effectively erased. It would appear that any agency having a general rule-making power can successfully assert the power to adopt legislative regulations after notice and comment procedures, and thus take advantage of the truncated adjudications and narrowly circumscribed judicial review that attend legislative rules.

B. *Scope of Review*

There exists a fundamental difference in the scope of judicial review accorded legislative and interpretive rules. Indeed, one reason the APA exempted interpretive rules from the preadoption requirements was that such rules were thought to be subject to plenary judicial review.[192] As Congress understood the difference in 1946, interpretive rules were simply the agency's legal opinion, as to which a court was free to substitute its judgment. Legislative rules, on the other hand, were upheld if they were not arbitrary or capricious and were rationally related to the purpose of the underlying statute.[193] If the validity of a regulation depended upon factual premises, the presumption of regularity required the court to assume facts supporting the regulation.[194]

Recent developments have sharply narrowed the gap between the intensity of judicial review accorded legislative rules and that accorded interpretive rules. In the case of legislative rules, the verbal formulation of the scope of the review has not changed,[195] but the actual scrutiny has become far more searching. This is not the place for an extended discussion of this trend, but a sketch of some recent developments is illuminating.[196] No longer are factual premises always assumed to support the agency's policy decision. On the contrary, the whole record is rigorously examined to see whether they do.[197] Under various verbal formulations, such as "clear error of judgment,"[198] the "hard look doctrine,"[199] or the requirement of "principled decision-making,"[200] the rule must be a justifiable exercise of the agency's discretion. The agency must consider the comments directed toward it[201] and must disclose and permit scrutiny of its methodology.[202] Various procedural innovations have been imposed on the agency to improve its decisionmaking and to facilitate review.[203] Its notice to the public must adequately alert those with an interest at stake.[204] Its statement of basis and purpose has to provide a comprehensive explanation of its reasoning.[205] The agency can be compelled to clarify the portions of the rule that the court considers too vague.[206] Finally, the statute and its legislative history are closely and critically scrutinized in order to ascertain whether the regulation is truly a reasonable implementation of the statutory design.[207] Surely, this intensification of judicial review of legislative regulations is a development in administrative law of fundamental significance.

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[191] *See* 512 F.2d at 696.

[192] *See* note 55 *supra.*

[193] *See* Attorney General's Committee Report, *supra* note 53, at 115-20; F. Vom Baur, *supra* note 90, at 489. This remains the standard today under section 706(2)(A) of the Act. *See, e.g.*, Mourning v. Family Publications Serv. Inc., 411 U.S. 356, 369 (1973).

[194] *See, e.g.*, Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935).

[195] *See* note 193 *supra.*

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[196] *See* K. DAVIS, *supra* note 9, at 646-87.

[197] *See, e.g.*, Hooker Chem. & Plastic Corp. v. Train, 537 F.2d 620 (2d Cir. 1976); City of Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). The court in the latter case specifically argued that the scope of review of legislative regulations had to be searching so that the agency would not be rewarded for casting its lawmaking in the form of rules rather than adjudications. *See generally* Currie & Goodman, *Judicial Review of Federal Administrative Action: The Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 39-52 (1975); Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975); Verkuil, *supra* note 80.

[198] Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971); Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973).

[199] Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[200] O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, C.J., concurring); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

[201] *See* Rodway v. United States Dept. of Agriculture, 514 F.2d 809, 814 (D.C. Cir. 1975), *noted in* 44 FORDHAM L. REV. 402 (1975).

[202] *See* Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375, 392-93 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 643 (D.C. Cir. 1973).

[203] *See* Thompson v. Washington, 497 F.2d 626, 643 (D.C. Cir. 1973); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1263 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1305-15 (1975); Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 425-26 (1975); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 782-83 (1974).

[204] *See* Maryland v. EPA, 530 F.2d 215, 220 (4th Cir. 1975), *cert. granted*, 96 S. Ct. 2224 (1976); Rodway v. United States Dept. of Agriculture, 514 F.2d 809, 814-15 (D.C. Cir. 1975); Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1019-20 (3d Cir. 1972).

[205] *See* National Assn. of Food Chains, Inc. v. ICC, 535 F.2d 1308, 1314 (D.C. Cir. 1976); Amoco Oil Co. v. EPA, 501 F.2d 722, 739 (D.C. Cir. 1974); Rodway

At the same time, the judicial review accorded interpretive regulations is far less intense than traditional statements about substitution of judgment would indicate.[208] In fact, the courts nearly always defer to interpretive regulations and to an agency's interpretation of its own regulations.[209] Indeed, the standard of judicial review is sometimes stated in terms of whether a rule reasonably implements the statute—exactly the same test accorded legislative rules.[210] Consider, for example, this wholly typical quotation, from a case involving a rule relating to administration of the public land laws:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.
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> . . . If therefore, the Secretary's interpretation is not *unreasonable*, if the language of the orders bears his construction, we must reverse the decision of the Court of Appeals.[211]

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v. United States Dept. of Agriculture, 514 F.2d 809 (D.C. Cir. 1975); Citizens Assn. v. Zoning Commn., 477 F.2d 402, 408 (D.C. Cir. 1973).

[206] *See* Hooker Chem. & Plastic Corp. v. Train, 537 F.2d 620, 633, 639 (2d Cir. 1976); National Assn. of Independent Television Producers & Distribs. v. FCC, 516 F.2d 526, 539, 541 (2d Cir. 1975).

[207] *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 213-29 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 379-86 (1969); Zemel v. Rusk, 381 U.S. 1, 8-11 (1965). When constitutional issues are implicated, the court's scrutiny of the statutory basis for a regulation is particularly strict. *See, e.g.*, Hampton v. Mow Sun Wong, 422 U.S. 88, 105-14 (1976).

[208] *See* note 55 *supra*.

[209] *See, e.g.*, Northern Indiana Pub. Serv. Co. v. Porter County Chapter, 423 U.S. 12 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945); Gueory v. Hampton, 510 F.2d 1222, 1223-24 (D.C. Cir. 1974); Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971, 977 (5th Cir. 1974).

[210] Much the same result is achieved by treating agency interpretations as questions of fact reviewable under the reasonableness approach of the substantial evidence test. *See, e.g.*, NLRB v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956).

[211] Udall v. Tallman, 380 U.S. 1, 16, 18 (1965) (emphasis added). In tax

Of course, interpretive rules are occasionally subjected to plenary review and sometimes invalidated by the courts. But generally it appears likely that those regulations would have been equally invalid if they had been legislative[212] because the invalidity of the rule seems conclusively mandated by the legislative history and policy.[213] Courts seldom employ the sort of free-wheeling substitution of judgment that the traditional model permits.

There are a number of factors that are generally considered important in assessing the degree of deference that should be accorded an interpretive rule.[214] Among other factors,[215] an interpretive rule is more likely to be considered valid if it has been longstanding, was contemporaneous with the adoption of the statute, has been consistently adhered to, or has been called to the attention of Congress which approved it or reenacted the statute without change. The fact that courts frequently focus on these criteria might suggest that the process of review of interpretive rules is fundamentally different from the review accorded legislative rules, where these factors are not expressly employed. But many of these factors are, in fact, quite relevant in determining the validity of a legislative regulation that might or might not reasonably implement the statutory design.[216] Further, many of the factors seem to be used as makeweights: Having decided whether the interpretive regulation is valid, the court mentions all the factors it can muster that tend to support its decision.[217]

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cases, the courts also uphold interpretive rules if they implement the statute "in some reasonable manner." United States v. Correll, 389 U.S. 299, 307 (1967). *See* Coca-Cola Bottling Co. v. United States, 487 F.2d 528, 532 (Ct. Cl. 1973) (legislative tax regulation seemingly given same scope of review as interpretive regulations). *But see* Allstate Ins. Co. v. United States, 329 F.2d 346, 349 (7th Cir. 1964) (special deference to legislative tax rule).

[212] *See* H.M. Hart & A. Sacks, The Legal Process 1320 (Tent. ed. 1958) (unpublished), which suggests that the task of statutory construction is the same whether an interpretive or legislative rule is being reviewed.

[213] *See* Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1974); United States v. Cartwright, 411 U.S. 546 (1973); Wilderness Socy. v. Morton, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973); Kurzner v. United States, 413 F.2d 97 (5th Cir. 1969).

[214] For a comprehensive discussion see 1 K. Davis, *supra* note 51, §§ 5.05-5.07, at 314-38.

[215] In Skidmore v. Swift & Co., 323 U.S. 134 (1944), the Court considered whether the interpretation was made in the course of the administrator's official duties, whether it was based upon specialized experience and broad information and investigation, the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and "all those factors which gave it power to persuade, if lacking power to control." 323 U.S. at 140.

[216] 1 K. Davis, *supra* note 51, § 5.06, at 329.

[217] *See, e.g.*, Helvering v. Reynolds, 313 U.S. 428 (1941).

Although the techniques of reviewing interpretive and legislative rules are converging, it would be undesirable if the differences were wholly to disappear. Interpretations, after all, take many forms. Some are carefully considered interpretive rules published in the *Federal Register*, or closely reasoned legal conclusions reached in formal adjudications. But other interpretations, such as advice letters in response to inquiries from the public, generally receive much less thoughtful analysis from the agency staff. In reviewing various interpretive material, the courts should not be limited to the narrow scope of review applicable to a legislative rule. Instead, they should retain their power to substitute judgment on issues of law, giving deference to the administrative interpretation when appropriate, but substituting judgment when the court's superior ability in statutory construction or its broader policy perspective is called for.[218] Nevertheless, the evolution in the intensity of judicial review of both interpretive and legislative rules has seriously undermined the judgment of the APA's draftsmen that the public should be excluded from interpretive rulemaking because the rules receive plenary judicial review.

C. *Ripeness*

Another important development in contemporary administrative law is the increasing availability of judicial review of rules prior to their enforcement in adjudication.[219] There is authority for the view that interpretations generally, and interpretive rules in particular, are not ripe for preenforcement review.[220] Much of this authority, however, predates the Supreme Court's landmark analysis of ripeness in *Abbott Laboratories v. Gardner*,[221] which contributed greatly to the withering away of the ripeness doctrine as an obstacle to preenforcement review of administrative rules. Under the *Abbott Laboratories* standard, the ripeness of agency action depends on the degree of practical harm to plaintiff from a delay in review, the fitness of the issues for immediate review, and the injury to the public from immediate review.[222] Applying the *Abbott Laboratories* analysis, the courts have found that interpretive rules,[223] as well as policy statements[224] and all sorts of informal agency action,[225] are susceptible to immediate judicial review. For example, the District of Columbia Circuit held the revenue ruling in the *Eastern Kentucky* case to be interpretive but nevertheless reviewed it before it was applied.[226] Similarly, in *National Automatic Laundry & Cleaning Council v. Shultz,*[227] an opinion letter from the agency head to a trade association was held ripe for review.

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[218] However, if the public has participated in making the rule, and the agency appears to have considered carefully the input it received from the public, the rule might appropriately be given considerable deference by a reviewing court.

[219] *See generally* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443 (1971).

[220] *See, e.g.*, Abbott Laboratories v. Celebrezze, 352 F.2d 286 (3d Cir. 1965), *revd. on other grounds*, 387 U.S. 136 (1967) (interpretive rule); American President Lines, Ltd. v. FMC, 316 F.2d 419 (D.C. Cir. 1963) (interpretive rule); Helco Prods. v. McNutt, 137 F.2d 681 (D.C. Cir.), *cert. denied*, 320 U.S. 671 (1943) (advisory letter).

[221] 387 U.S. 136 (1967).

Interpretive rules, as well as policy statements, will be frequently unripe for preenforcement review[228] because the practical harm caused by an interpretive rule is often less serious than that caused by a legislative rule. But *Eastern Kentucky* and *National Automatic Laundry*, among other cases, illustrate that interpretive rules can cause immediate practical harm that justifies immediate review.[229] Further, interpretive rules adopted without public participation may not be suitable for review because of the lack of a record.[230] This shortcoming is not conclusive, however, since some regulations present strictly legal issues and can be reviewed without a record;[231] in other cases, the court could remand to the agency for the purposes of building a record.[232]

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[222] 387 U.S. at 148-56.

[223] *See, e.g.*, Frozen Foods Express v. United States, 351 U.S. 40 (1956); Independent Bankers Assn. v. Smith, 534 F.2d 921 (D.C. Cir. 1976); Toilet Goods Assn. v. Gardner, 360 F.2d 677 (2d Cir. 1966), *affd. on other grounds*, 387 U.S. 158, 167 (1967); Gordon v. Federal Reserve Sys., 317 F. Supp. 1045 (D. Mass. 1970). For the view that *Frozen Foods* involved preenforcement review of an interpretive rule, see M. ASIMOW, *supra* note 88, at 115-17; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 405-06 (1965); Vining, *supra* note 219, at 1463 n.73. *See also* National Assn. of Ins. Agents v. Federal Reserve Sys., 489 F.2d 1268, 1271 (D.C. Cir. 1968), in which the court, although acknowledging that interpretive rules are usually unreviewable, indicated that a strong showing of immediate and inescapable effect might permit preenforcement review.

[224] *E.g.*, Continental Air Lines v. CAB, 522 F.2d 107, 124 (D.C. Cir. 1975); Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

[225] *E.g.*, Independent Broker-Dealers' Trade Assn. v. SEC, 442 F.2d 132 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971) (seemingly cited with approval in Gordon v. New York Stock Exch., 422 U.S. 659, 690 n.15 (1975)); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1098 (D.C. Cir. 1970).

[226] Eastern Ky. Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), *revd. on other grounds*, 96 S. Ct. 1917 (1976). However, in a dissenting opinion, Justice Brennan argued that the ruling was not ripe for review. *See* 96 S. Ct. at 1928.

[227] 443 F.2d 689 (D.C. Cir. 1971).

[228] *See* Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974); Continental Oil Co. v. Burns, 317 F. Supp. 194 (D. Del. 1970).

[229] For a discussion of the practical harm caused by informal SEC action, see Independent Broker-Dealers' Trade Assn. v. SEC, 442 F.2d 132 (D.C. Cir. 1971).

[230] *See* Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 39-40 (D.C. Cir. 1974).

The fact that interpretive rules are susceptible to preenforcement judicial review has a significant bearing on the issue of public participation. First, the decline of the ripeness doctrine marks the end of yet another characteristic of interpretive rules traditionally assumed to distinguish them from legislative rules. Second, the record produced would help the courts gauge more accurately the practical impact of the rule and thus the need for preenforcement judicial review. Finally, the existence of a record facilitates substantive review of the rule. The public's comments, and the agency's response to them in its concise statement of basis and purpose, are of great value to the reviewing court. Even though the court frequently defers to the agency's policy judgment, the existence of a record tends to assure the court that the agency has thoroughly considered all aspects of the rule.

D. *Retroactivity*

Another traditional difference between legislative and interpretive regulations is that legislative rules are generally prospective in application[233] while interpretive rules are frequently retroactive.[234] The theory was that a statute or legislative rule states the law; the interpretive rule simply clarifies law that has existed all along.

This distinction is still meaningful, but the difference is less significant than the theory would suggest. First, legislative regulations are often retroactive, either in their practical or their legal effect. For example, a prospective legislative rule can destroy business relationships that had been established in reliance on prior law.[235] Moreover, like statutes,[236] explicitly retroactive legislative regulations occasionally are valid. Thus in *Addison v. Holly Hill*

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[231] Surely, all legislative rules adopted without public participation because of the military and foreign affairs exemption and proprietary functions exemption, 5 U.S.C. § 553(a)(1)-(2) (1970), are not immune from preenforcement review.

[232] *See, e.g.*, Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

[233] *See* Greene v. United States, 376 U.S. 149, 160 (1964); Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 389 (1932).

[234] *See* Dixon v. United States, 381 U.S. 68 (1965).

[235] *See* Mulford v. Smith, 307 U.S. 38 (1939); South Terminal Corp. v. EPA, 504 F.2d 646, 678 (1st Cir. 1974); Robinson, *supra* note 183, at 517-18; Shapiro, *supra* note 51, at 933-34.

[236] *See* Usery v. Turner Elkhorn Mining Co., 96 S. Ct. 2822 (1976).

Fruit Products Co.,[237] an originally promulgated regulation had been found invalid and a replacement was adopted. Under these circumstances, the replacement regulation could be retroactive. In *Thorpe v. Housing Authority*,[238] the Supreme Court held that new regulations requiring notice and procedural protections for tenants evicted from public housing must be applied retroactively by the local housing authority to evictions occurring before they were adopted. Still, these cases are exceptional; generally, agencies do not seek to make their legislative regulations retroactive.

In accordance with traditional theory, interpretive regulations, like decisions reached in adjudication, can legally be retroactive.[239] However, it seems reasonably clear that an agency can choose to make an interpretive rule prospective only,[240] and many of them have done so.[241] Indeed, the definition of "rule" in the APA strongly suggests that all rules, interpretive and legislative, should be of "future effect,"[242] and new interpretations are explicitly required to be prospective by statutes applicable to the Equal Employment Opportunities Commission, the Securities and Exchange Commission, and the Wage and Hour Division of the Department of Labor.[243] Courts may construe an ambiguous interpretation to have exclusively prospective effect,[244] and, according to the Supreme Court, an interpretive regulation can create a reliance interest that precludes a criminal prosecution for violation of the statute.[245]

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[237] 322 U.S. 607 (1944). More frequently, the courts deal with this situation by ordering the invalidly adopted regulations to remain in effect until new ones can be adopted. *See, e.g.*, Rodway v. United States Dept. of Agriculture, 514 F.2d 809, 817 (D.C. Cir. 1975).

[238] 393 U.S. 268 (1969). *See* Maceren v. INS, 509 F.2d 934 (9th Cir. 1974); General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971); Certified Color Indus. Comm. v. Flemming, 283 F.2d 622 (2d Cir. 1960); Steert v. Morgenthau, 116 F.2d 301 (D.C. Cir. 1940). *See generally* Note, *Retroactive Operation of Administrative Regulations*, 60 HARV. L. REV. 627 (1947).

[239] *See* United States v. Zenith-Godley Co., 180 F. Supp. 611 (S.D.N.Y. 1960), *affd. per curiam*, 295 F.2d 634 (2d Cir. 1961).

[240] *See* Pressed Steel Car Co. v. Lyons, 7 Ill. 2d 95, 104-05, 129 N.E.2d 765, 770 (1955); 1 K. DAVIS, *supra* note 51, § 5.09; Note, *supra* note 238, at 633-34. Helvering v. Wilshire Oil Co., 308 U.S. 90 (1939), can be interpreted as approving a prospective rule. Still, it is not definitely settled that interpretive rules can be confined to prospective application. *See* Baird, *supra* note 161; Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 698-707 (1954).

[241] *See generally* M. ASIMOW, *supra* note 88, at 7-8, 30-31; Baird, *supra* note 161.

[242] 5 U.S.C. § 551(4) (1970).

[243] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b) (1970); Securities and Exchange Act of 1934 § 23(a), 15 U.S.C. § 78w(a) (Supp. V 1975) (*amending* 15 U.S.C. § 78w(a) (1970)); Securities Act of 1933 § 19(a), 15 U.S.C. § 77s(a) (1970); Wage & Hour Division Act, 29 U.S.C. § 259 (1970). These statutes protect persons relying on interpretations from retroactive changes. *See generally* Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1294 (2d Cir. 1973); M. ASIMOW, *supra* note 88, at 30, 147, 185-86. Section 7805(b) of the Internal Revenue Code authorizes the IRS to make all interpretations prospective. Under this statute retroactive interpretations can be set aside as an abuse of discretion. *See*

Another inhibition to retroactive changes in interpretive rules is the principle that the agency is bound by its own rules. It cannot depart from them in individual cases.[246] Although this doctrine usually is applied to procedural provisions, it seems equally applicable to interpretive rules.[247]

Yet another barrier to retroactive changes in interpretive rules are the doctrines of equitable estoppel and apparent authority. Slowly but surely, these private law rules are becoming applicable in actions against the government. Although strong Supreme Court authority stands against this trend,[248] the lower courts on numerous occasions have found ways to circumvent this authority in order to prevent retroactive changes in position by the government from disturbing well-founded reliance interests.[249] The principles of estoppel and apparent authority probably will most frequently be applicable to cases of individual advice by the agency, rather than to interpretations of general applicability, since courts might be reluctant to extend an estoppel to an unpredictably large group of persons. But estoppel and apparent authority issues are equitable notions; their application depends on a comparison of the detriment to the plaintiffs from enforcing the rule with the harm to the public from enjoining it. If the equities demand it, a court could easily hold that the government abused its discretion by making, or was estopped to make, a retroactive change in an interpretive rule of general applicability.

Chock Full O' Nuts Corp. v. United States, 453 F.2d 300 (2d Cir. 1971). *See generally* Lynn & Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 TAX. L. REV. 487 (1964); Comment, *Limits on Retroactive Decision Making by the Internal Revenue Service: Redefining Abuse of Discretion Under Section 7805(b)*, 23 U.C.L.A. L.REV. 528 (1976).

[244] *See, e.g.*, Crespo v. United States, 399 F.2d 191 (Ct. Cl. 1968).

[245] *See* United States v. Pennsylvania Indus. Chem. Co., 411 U.S. 655 (1973).

[246] *See* Gardner v. FCC, 530 F.2d 1086, 1089-90 (D.C. Cir. 1976).

[247] *See, e.g.*, Vogt v. United States, 537 F.2d 405, 412-13 (Ct. Cl. 1976); Nader v. Nuclear Regulatory Commn., 513 F.2d 1045, 1051 (D.C. Cir. 1975); Distrigas of Mass. Corp. v. FPC, 517 F.2d 761, 765 (1st Cir. 1975); United States v. Ewig Bros. Co., 502 F.2d 715, 725 n.34 (7th Cir. 1974). *But see* Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974) (guidelines in manual not binding on agency); Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM. L. REV. 823, 840 (1975). *Cf.* United States v. Nixon, 418 U.S. 683, 694-96 (1976).

[248] *See* M. ASIMOW, *supra* note 88, at 33-37.

[249] *See* United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); M. ASIMOW, *supra* note 88, at 37-59; Asimow, *Estoppel Against the Government: The Immigration and Naturalization Service*, 2 CHICANO L. REV. 4 (1975).

Moreover, it seems clear that retroactive changes in the law resulting from *adjudication* may be set aside as an abuse of discretion. As explained in *SEC v. Chenery Corp.*,[250] a retroactive adjudicatory change might be invalidated if the damage to reliance interests outweighed the mischief of allowing a particular case to escape the administrative clutches. Recently, in *NLRB v. Bell Aerospace*,[251] the Supreme Court permitted a retroactive change resulting from adjudication, but made it clear that such changes are not always permissible. Lower courts have occasionally set aside retroactive changes reached through adjudication.[252] If retroactive changes resulting from adjudication can be an abuse of discretion, it surely is clear that retroactive changes in interpretive rules can also be set aside.[253]

E. *Waivers of Legislative Rules*

It is often said that the effect of interpretive and legislative rules differs when they are applied in subsequent adjudication. If the rule is legislative, the agency applies the rule. If the rule is interpretive, the agency applies the statute. This distinction is significant, but once again its importance can easily be overstated.

When a legislative rule is applied in adjudication, an agency must permit parties to petition for a waiver of the rule.[254] This means that the agency must consider whether it is appropriate to apply the rule in the particular case. Similarly, when an interpretive rule is applicable in an adjudication, the agency must decide whether to follow the rule, find it inapplicable to the particular case, or even revoke it. In practical terms, therefore, this difference between legislative and interpretive rules is more illusory than real. In each case, the agency will probably apply its rule to the parties before it, but the agency must first consider whether application of either a legislative or an interpretive rules is inappropriate.

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[250] 332 U.S. 194 (1947).

[251] 416 U.S. 267, 294 (1974).

[252] *See, e.g.*, NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966); NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952). *See generally* Berger, *Retroactive Administrative Decisions*, 115 U. PA. L. REV. 371 (1967).

[253] It is somewhat anomalous, therefore, that law changes made in adjudications probably cannot be made prospective only. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 774-75 (1969). Evidently, changes in policy, if they are to be prospective, must come through rulemaking.

[254] *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956); Southwest Pa. Cable Television, Inc. v. FCC, 514 F.2d 1343, 1347 (D.C. Cir. 1975); Claggett, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51; Fuchs, *Agency Development of Policy Through Rulemaking*, 59 NW. U.L. REV. 781, 804 (1965).

F. *Summary*

There remains a fundamental difference between legislative and interpretive rules. Legislative rules are made pursuant to delegated legislative power, but interpretive rules represent the agency's view of the meaning of the law. Notwithstanding this clear conceptual difference, much has occurred since 1946 to make the distinction between legislative and interpretive rules extremely blurry and, in many situations, downright unnecessary. Since legislative rule-making powers are broadly construed, many regulations once thought to be interpretive are now legislative. The formerly clear differences with respect to intensity of judicial review, ripeness, and retroactivity have sharply narrowed. Since these traditional barriers are crumbling, it should not be surprising that the courts have begun to erase still another line by requiring notice and comment procedures before the adoption of what traditionally would have been considered interpretive rules.

IV. A Proposal for Postadoption Procedures for Nonlegislative Rules

As we have seen, the courts have repeatedly dealt with claims that the public should be entitled to participate in the making of interpretive rules and policy statements. The resolution of these claims has been unsatisfactory. Under the legal effect test, the results are relatively predictable, but the courts have been oblivious to the public's need to take part in the formulation of many rules. Under the substantial impact test, the courts have been attentive to the needs of the public, but the results have been unpredictable and the conceptual basis of the decisions unclear. The problem thus seems resistant to solution by ad hoc judicial decisions. Consequently, it seems worthwhile to consider whether the problem might better be resolved through congressional amendment of the APA. Before turning to an evaluation of proposed statutory changes, it is helpful to summarize the values of public participation in rulemaking.

A. *The Importance of Public Participation in Rulemaking*

The APA introduced the concept of mandatory public participation in federal rulemaking. The concept of notice and comment procedure is widely accepted as a truly progressive contribution to better government.[255] The advantages of public participation in rulemaking have been enumerated so often that there is little need for this article to dwell on them in great detail.[256]

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[255] *See, e.g.*, K. Davis, *supra* note 61, at 65-68.

The primary reason that public participation leads to better rules is that it provides a channel through which the agency can receive needed education. Agencies are not omniscient and do not have all relevant economic and social data. They cannot anticipate all of the consequences and problems that will flow from the adoption of their rules. This sort of data is obtained by requiring the agency to solicit and consider public comments. The interviews conducted in connection with this study repeatedly indicated the practical value that agency personnel attach to public commentary, including that obtained in the course of adopting interpretive rules and policy statements. Public input also contributes to better rulemaking by offsetting institutional biases that may exist in favor of or against the regulated group. Moreover, the public may be more likely to accept and less likely to sabotage a rule if it has been allowed to participate in its formulation.[257]

Public participation in rulemaking also has values that transcend these instrumental ones. In our system of representative government, participation in governmental decisionmaking by persons affected by it is an affirmative good. This is particularly true in the case of administrative agencies, which are not as politically responsive as the legislature or the executive. Although theoretically subject to a variety of legislative, executive, and judicial controls, most agency action, and particularly rulemaking, is not supervised at all.[258] Agencies make laws affecting many interests behind closed doors; their impartiality and freedom from pressures are frequently questioned.[259] Notice and comment procedures in rulemaking are ideally tailored to increase the responsiveness of the agency and to facilitate democratic participation. They permit public participation at a critical moment in administration when law and policy are about to crystallize, and they provide a powerful tool by which persons who will be adversely or favorably affected by agency action can seek to influence that action in an open fashion.

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[256] *See* Bonfield, *supra* note 94, at 540-42; Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 527-32 (1972); Comment, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886, 893-98 (1975). *But see* Koch, *supra* note 9, at 1077-78.

[257] For example, the parole board, while it did not find comments from prisoners particularly helpful in developing parole guidelines, indicated that the prisoners' participation in formulating guidelines made the guidelines more acceptable to them.

[258] *See* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

[259] In response to this concern, the House Judiciary Committee, during the 94th Congress introduced a bill that would require congressional scrutiny of regulations before they become effective. H.R. 12048, 94th Cong., 2d Sess., 122 CONG. REC. 1280 (1976). However, the bill was rejected in the House.

Public participation is no less necessary in the formulation of interpretive rules and policy statements than in legislative rulemaking. The agency is as much in need of information when it interprets its law or regulations, or when it formulates guidelines for exercising its discretion, as it is when it imposes binding norms on the public.[260] As we have seen, the impact of many interpretations or policy statements can be as great as that of legislative rules. And the democratic values of public participation are as well served by requiring preadoption procedures in the formulation of nonlegislative rules as in the formulation of legislative rules. Consequently, if the problem is to be left to judicial resolution, I favor the use of the substantial impact test, despite its uncertainty of application. However, perhaps the best solution lies in congressional amendment of the APA, a possibility that will now be considered.

B. *Repeal of the Exemption*

One obvious statutory solution entails repeal of the exemption for nonlegislative rules from the APA. This would open the process to public participation and eliminate the need to distinguish between legislative and nonlegislative rules. This proposal is ill-advised, however, since two of the reasons for originally adopting the exemption still seem persuasive. The APA draftsmen wished to encourage the adoption of interpretive rules and policy statements by not requiring burdensome procedures. They were also concerned by the inappropriateness of mandating a single, rigid procedure for the many forms that nonlegislative rulemaking may take.[261]

Interviews with many agency personnel indicate nearly unanimous opposition to expansion of preadoption procedures to all interpretive rules and policy statements. This opposition is similar to that voiced when Congress contemplated repeal of the exemptions in the 1960's and to objections eloquently expressed by Professors Kenneth Davis and Arthur Bonfield.[262]

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[260] *See* Popkin, *A Critique of the Rule-Making Process in Federal Income Tax Law With Special Reference to Conglomerate Acquisitions,* 45 IND. L.J. 453, 492-513 (1970) (criticism of IRS published rulings).

[261] The Senate Judiciary Committee staff wrote:

> First, it is desired to encourage the making of such rules. Secondly, those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in subsection (c) affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that 'interpretative' rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas 'substantive' rules involve a maximum of administrative discretion.

APA LEGISLATIVE HISTORY, *supra* note 55, at 18.

The objections to an extension of notice and comment procedures focus on a comparison of the proposal's costs and benefits. One significant cost is that the proposal will substantially delay adoption of nonlegislative rules. As a practical matter, it is difficult to nurse a controversial rule through the statutory procedures in less than six months to a year. During that period, there is uncertainty about whether the new rule will be adopted, and a less desirable interpretation or policy may remain in effect. A second cost is the substantial increase in workload that will result from a good faith evaluation of a large volume of public comments. For example, organized letter-writing campaigns occasionally swamp the agency. These burdens may divert agency personnel from more worthwhile tasks. A third, related cost is that the agency may decide that nonlegislative rulemaking is not worth the trouble. It might simply refuse to adopt the interpretation or policy and instead deal with the particular problem through case-by-case adjudication, private advice letters, individual contacts with the public, or informal internal communication. This would deny the public the benefit of a generally applicable and well-publicized rule. If legislation seriously inhibited the adoption of interpretive rules and policy statements, it would not serve the public interest.

These problems are particularly acute in agencies that issue substantial numbers of interpretations and policy statements. Consider, for example, the operations instructions of the Immigration Service or multi-volume staff manuals of the Internal Revenue Service or Occupational Safety and Health Administration. Many items that could be considered interpretations of general applicability or general policy statements are mixed in with merely procedural instructions. If the agency were required to follow public notice and comment procedures each time it wanted to amend its manual, its operations would be seriously rigidified.

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[262] Professor Davis, expressing his opposition to the proposed legislation in testimony before Congress, argued that it would discourage the adoption of interpretive rules and policy statements. *See Administrative Procedure: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 150, 174 (1965). For the views of Professor Bonfield, see Bonfield, *supra* note 9. Interestingly, Professor Bonfield favored the elimination of exemptions under the Iowa statute. *See* Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 IOWA L. REV. 731, 858-60 (1975). Professor Bonfield indicated that his change of position was motivated partly by a desire to see whether the agencies would in fact substitute adjudication for rulemaking. Moreover, he noted that the Iowa legislators were unalterably opposed to the exemption. Letter from Arthur Bonfield to Michael Asimow (August 26, 1975).

The benefits attending such a vast expansion of preadoption procedures would be slight. In all likelihood, the vast majority of interpretations and policy statements would elicit no public interest at all. They would be either obviously correct, trivial in importance, or utterly noncontroversial. Some nonlegislative rules, of course, are quite important and would generate significant commentary; such commentary could well result in the modification of some rules. From the point of view of both the public and the agency, however, the costs seem clearly to outweigh the benefits of requiring preadoption procedures for all nonlegislative rules.

One response to these arguments, however, is that an agency can eliminate some or all of the procedures for rulemaking if it finds in good faith that such procedures are "unnecessary, impracticable, or contrary to the public interest."[263] By making this finding, the agency could dispense with required notice and comment when the rule is trivial or when it must be made effective immediately. Yet the good cause exemption is not a complete answer to the problem, since an issue of whether the agency had abused its discretion would be raised each time the exemption was claimed.[264] An obstructionist litigating strategy would be open to anyone aggrieved by the rule,[265] and the uncertainty of whether the good cause exemption was proper might itself inhibit its use.

On the other hand, there might well be such massive utilization of the good cause exemption that its use would become mechanical. Consequently, the public might, in the end, be invited to participate in the making of very few interpretive rules and policy statements. Thus, by employing the good cause exemption, the agencies could probably avoid the costs of public participation in their rule-making processes, but only by returning to a pattern of exclusion that the reform was designed to remedy in the first place.

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[263] 5 U.S.C. § 553(b)(B), 553(d)(3) (1970). *See generally* Bonfield, 71 MICH. L. REV. 222, *supra* note 94, at 291-315; Bonfield, 118 U. PA. L. REV. 540, *supra* note 94, at 588-608.

[264] Generally, courts have upheld good cause findings. *See, e.g.*, Nader v. Sawhill, 514 F.2d 1034 (Emer. Ct. App. 1975); Reeves v. Simon, 507 F.2d 455, 458 (Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975); De Rieux v. Five Smiths, Inc., 499 F.2d 1321, 1322 (Emer. Ct. App.), *cert. denied*, 420 U.S. 991 (1975); Durkin v. Edward S. Wagner Co., 115 F. Supp. 118, 121-22 (E.D.N.Y. 1953), *affd. sub nom.* Mitchell v. Edward S. Wagner Co., 217 F.2d 303 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955). However, good cause findings have also been rejected, either because they were not explicit or the court disagreed with the agency's reasoning. *See, e.g.*, Detroit Edison Co. v. EPA, 496 F.2d 244, 248 (6th Cir. 1974); Texaco, Inc. v. FPC, 412 F.2d 740, 743 (3d Cir. 1969); American College of Neuropsychopharmacology v. Weinberger, No. 75-1187 (D.D.C. July 3, 1975); New York v. Diamond, 379 F. Supp. 503, 517 (S.D.N.Y. 1974); Kelly v. Interior Dept., 339 F. Supp. 1095, 1101 (E.D. Cal. 1972).

[265] *But see* Koch, *supra* note 9, at 1057. Professor Koch's view that the overall amount of litigation would not be increased since procedural challenges would simply be appended to substantive challenges to the rules is not persuasive. Many interpretive rules and policy statements are not ripe for immediate substantive review, *see* text at notes 219-32 *supra*, but would be ripe for procedural challenges. Moreover, many rules, which would not be challenged on substantive grounds, would be subject to attack on procedural grounds because the likelihood of success is greater. Thus, increased litigation would result.

C. *Postadoption Notice and Comment*

This article recommends that Congress amend the APA to require postadoption public participation for nonlegislative rules.[266] Under the recommended procedure, the agency could issue, amend, or repeal its interpretive rules of general applicability and general policy statements without giving any prior notice, allowing the public to comment prior to adoption, or delaying the rule's effectiveness for a specified period.[267] However, publication of the rule in the *Federal Register* or some other generally available form, like the

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[266] This proposal has been approved in substance by the Administrative Conference of the United States in Recommendation 76-5. This recommendation, addressed to the agencies rather than Congress, suggests that postadoption commentary would be good practice but does not suggest that the Act be amended:

> 1. Before an agency issues, amends, or repeals an interpretive rule of general applicability or a statement of general policy which is likely to have substantial impact on the public, the agency normally should utilize the procedures set forth in Administrative Procedure Act subsections 553(b) and (c), by publishing the proposed interpretive rule or policy statement in the Federal Register, with a concise statement of its basis and purpose and an invitation to interested persons to submit written comments, with or without opportunity for oral presentation. If it is impracticable, unnecessary, or contrary to the public interest to use such procedures the agency should so state in the interpretive rule or policy statement, with a brief statement of the reasons therefor.
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> 2. Where there has been no pre-promulgation notice and opportunity for comment the publication of an interpretive rule of general applicability or a statement of general policy, even one made effective immediately, should include a statement of its basis and purpose and an invitation to interested persons to submit written comments, with or without opportunity for oral presentation, within a following period of not less than thirty days. The agency should evaluate the rule or statement in the light of comments received. Not later than sixty days after the close of the comment period, the agency should indicate in the Federal Register its adherence to or alteration of its previous action, responding as may be appropriate to significant comments received. An agency may omit these post-adoption comment procedures when it incorporates in the interpretive rule or policy statement a declaration, with a brief statement of reasons, that such procedures would serve no public interest or would be so burdensome as to outweigh any foreseeable gain.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 76-5 (Dec. 10, 1976).

[267] For a similar proposal, see L. WRIGHT, NEEDED CHANGES IN IRS CONFLICT RESOLUTION PROCEDURES 67-68 (1971). The procedure has occasionally been employed by the agencies. *See, e.g.*, 40 Fed. Reg. 30,936 (1975). However, the procedure appears to be unacceptable under present law if notice and comment procedures are otherwise required. *See* American College of Neuropsychopharmacology v. Weinberger, No. 75-1187 (D.D.C. July 3, 1975).

Internal Revenue Bulletin, would be accompanied by an invitation to the public to comment on the rule.[268] Comments would be received for a substantial period of time, such as a minimum of sixty days. The rule would also include a concise statement of its basis and purpose, as is presently required for legislative rules.[269]

The agency staff would then be required to evaluate the comments received and publish its response to them. As a result of public reaction, the rule might be amended, repealed, or left intact, but in any event, the agency would be obligated to defend its rule by replying to the comments, as is presently required for conventional legislative rulemaking.[270] The statute would set a deadline for the agency's reply, perhaps sixty days from the end of the comment period. During the postadoption period, the rule would be in full force, unless the agency chose to give it a deferred effective date.

This proposal has a number of advantages. First, it would permit the issuance of nonlegislative rules without delay. This would be beneficial to both the agency and the public. It would minimize confusion and uncertainty and allow the agency's chosen interpretation or policy to be applied immediately. Second, it would encourage the participation of the public by making it clear that the agency would be required to consider interested persons' comments and reply to them, and that a reviewing court would take the comments and replies into account. Third, it would supply a record that would facilitate judicial review. Fourth, it seems unlikely that this procedure would deter the agency from adopting interpretive rules and policy statements. Finally, this approach seems a far better solution than an abolition of the exemption for nonlegislative rules coupled with reliance on the good cause exemption. If the rule is trivial or noncontroversial, nobody will comment on it, but if the rule is needed because of an emergency, the agency can adopt it immediately without fear that a court will disagree with its finding of emergency.

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[268] A good cause exemption similar to those presently contained in sections 553 (b)(B) and 553(d)(3) of the Act should apply to the new procedure. Of course, no postadoption comments need be solicited if the agency employed the preadoption notice and comment procedure. One difficult issue is whether the postadoption procedure should apply to interpretive rules or policy statements adopted in *adjudication*. The Administrative Conference recently adopted a recommendation that rules adopted in adjudication be published in the *Federal Register*. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 76-2 (1976). However, interpretive rules and policy statements adopted in adjudication probably should not be subjected to mandatory posteffective public commentary. The parties to the adjudication have already furnished some input on the subject. Although the public probably could contribute additional insights, given the present development of administrative law concepts, it seems premature to insist on rule-making procedures for rules adopted in adjudication. An introductory paragraph of Administrative Conference Recommendation 76-5 specifically excludes rules adopted in adjudication from postadoption procedures. *See* note 266 *supra.*

[269] *See* note 5 *supra.*

[270] *See* text at note 205 *supra.*

There are, of course, objections to this proposal. The most important criticism is that postadoption public commentary is far less meaningful than preadoption commentary. According to this criticism, once an agency has adopted a rule in final form, the thinking of its staff may have rigidified. Thus, the staff's reply to postadoption commentary might be a mere articulation of an already hardened position rather than a principled response to suggested modifications of the rule.

This objection is less persuasive than it might initially appear to be. As a practical matter, it frequently happens that a proposed rule has undergone extensive review by the staff before public notice is given in compliance with preadoption procedures. Often the minds of the staff are made up before the public is ever invited to participate. In such cases, the public's commentary is viewed more as an annoyance than as a significant contribution. Nevertheless, it must be admitted that postadoption commentary is less likely to influence the final product than is preadoption commentary. However, if the staff acts in good faith, it will reconsider its position in light of postadoption comments; it must, after all, draft credible responses to them that may well be scrutinized by a reviewing court.

A second criticism of a postadoption procedure is that it depends upon the agency's publishing the rule in the *Federal Register* or in some other generally available form. Although publication is already required by the APA,[271] agency compliance with the provision is spotty[272] and the courts do not strictly enforce it.[273] Moreover, a good many interpretations and policy statements are in the form of manuals or instructions to staff that need not be published but only made available to the public.[274]

This objection has some validity, but the problem of nonpublication seems solvable. If the agency knows that its interpretive rules and policy statements could be held invalid for want of public participation, and that participation can be triggered only by publication, the agencies will have to reconsider their publication practices. Similarly, to the extent that instructions to staff contain generally applicable policy statements and interpretations,[275] these should be extracted and published separately as rules. Here again, a little judicial enforcement would go a long way.

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[271] 5 U.S.C. § 552(a)(1)(D) (1970).

[272] *See* E. Tomlinson, *supra* note 35, at 34-41; Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929, 934-43 (1950).

[273] *See, e.g.*, Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1038 (1975); Airport Comm. of Forsyth County v. CAB, 300 F.2d 185 (4th Cir. 1962); Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1976). In Morton v. Ruiz, 415 U.S. 199 (1974), the Court held that a legislative rule is ineffective without publication in the *Federal Register*. While refusing to follow the agency's interpretation because it was inconsistent with the congressional purpose, the court appeared willing to treat the rule as a validly adopted interpretive rule even though it had not been published.

[274] 5 U.S.C. § 552(a)(2)(C) (1970).

Many agencies will, no doubt, voice a third objection, that the creation of postadoption procedures will increase their workload. Staff must read, collate, evaluate, and respond to the public's comments, and they must adhere to a statutory time schedule in doing so. Of course, even under present law, the public can always petition for the issuance, amendment, or repeal of a rule,[276] and agency response to such petitions takes time. Still, a systematized form of postadoption public commentary will likely generate more comments than does the existing petition provision and agency costs will no doubt be increased by it. However, the increase will be far less than would occur if the present exemptions were simply repealed. Overall, the benefits to the public from postadoption commentary outweigh the modest additional costs that would be imposed on the agency.

A fourth objection is that the proposal will fail to solve the definitional problem raised by section 4 of the APA. There will continue to be uncertainty about whether a rule is legislative, so that preadoption procedure is required, or whether it is an interpretive rule or a policy statement, so that postadoption procedure is sufficient.[277] The definitional problem can be greatly alleviated, however. For example, the statute could provide that if the agency made a good-faith error in characterizing a new rule, the court could treat the postadoption commentary procedure as an adequate substitute for the usual preadoption procedures. Thus, the agency's failure to utilize preadoption procedures need not be grounds for declaring the rule invalid and requiring a new and probably fruitless cycle of rulemaking. It would often be better if the court could say to the agency: "You have erred. This is a legislative rule, not a policy statement or interpretive rule, but your error seems to have been in good faith. The postadoption procedures that you used were a close enough substitute for the usual preadoption procedures. Consequently, your error was not prejudicial and the rule will be allowed to stand." The court would also have the option, of course, of ordering a new cycle of preadoption rule-making procedure, and it would clearly want to do so if the agency seemed to make it a practice to misuse postadoption procedures.

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[275] Since instructions to staff and manuals are now public information, *see* Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973); Hawkes v. IRS, 467 F.2d 787, 795-97 (6th Cir. 1972), the fact that they contain interpretive rules and policy statements of general applicability will come to light. Persons aggrieved by them could argue that they are invalid for lack of *Federal Register* publication and public participation.

[276] 5 U.S.C. § 553(e) (1970). Indeed, it could be argued that postadoption procedures establish nothing more than is already provided in section 553. However, there is a vast difference between a right to petition the agency and an invitation by the agency for comments, together with an assurance that the agency will read and respond to the comments within a fixed period of time.

[277] Definitional problems exist on another level as well. Courts have determined that some agency behavior should not be treated as a rule at all. *See, e.g.*, National Ornament & Elec. Light Christmas Assn. v. Consumer Prod. Safety Commn., 526 F.2d 1368 (2d Cir. 1975) (program in which volunteer deputies would instruct retailers on how to test Christmas lights for defects, and report them to the Commission, and inventory the lights was held not to be a rule); Illinois Citizens Commn. for Broadcasting v. FCC, 515 F.2d 397, 402 (D.C. Cir. 1975) (speeches by individual agency members were not treated as rules). Furthermore, some staff

In fact, a new statute might even disapprove the substantial impact test entirely, causing the courts to return to the much clearer legal effect test. This amendment might adopt the legal effect standard, so that it would never be an abuse of discretion for the agency to dispense with preadoption procedures for rules that are labelled as interpretive or policy statements, regardless of their impact. Although such an approach would clarify the law, it would do so at a significant cost, and thus it is not recommended. The courts should retain the power to impose additional preadoption procedural requirements on agencies seeking to enact unusually significant nonlegislative rules.

Finally, opponents of any proposal to impose procedural requirements on nonlegislative rulemaking might complain of unclear consequences for agency failure to follow the required procedures. Suppose the invalidly adopted rule reflects the best interpretation or policy, or even the only correct one. Would the agency be required to substitute an inferior interpretation for the proper one, or to exercise its discretion in a manner inconsistent with its well-considered policies? Would the court always have to remand to the agency for a new rule-making procedure, even though the result is a foregone conclusion?

There is no simple answer to these questions and different courses of action would seem appropriate in different situations. Assume, for example, that an invalidly adopted rule represents a

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positions might be classified as not having been "adopted by the agency." *See* M. Asimow, *supra* note 88, at 85-88.

change in prior law or practice that might upset legitimate reliance interests or impose considerable individual hardship. Assume also that there would be little or no harm to the public in a holding that the new rule is invalid and the old one continues in effect. In this situation, the reviewing court could well find the new rule invalid and require the agency to comply with statutory procedures. The two immigration cases discussed in this article, *Lewis-Mota v. Secretary of Labor*[278] and *Noel v. Chapman*,[279] are illustrations of such situations. Nothing prevents the court from requiring the agency to retain its prior law or practice until a change is effected with proper procedures.[280]

There might also be cases in which the courts should refuse to allow an invalidly adopted interpretive rule or policy statement to be considered in litigation. The agency would therefore lose the advantage of judicial deference customarily accorded its interpretations or policies.[281]

Finally, consider the situation in which the new interpretation or policy is undoubtedly a correct one—perhaps the only correct one—and its adoption is therefore inevitable. Assume further that it represents no change in prior law or policy and that no private reliance interests could be based upon a contrary position. In this situation, the court could easily decide to let the invalidly adopted rule or policy stand. The agency might have erred, but its error was not a prejudicial one, and it would be a waste of time and effort to remand to the agency.[282] A possible illustration is the press release involved in *Airport Commission of Forsyth County v. CAB*,[283] where it would have been absurd to reverse the CAB's determination, which was so obviously correct, in order to start anew a process that could only yield the same result.

All that can be said is that reviewing courts must decide on a case-by-case basis precisely how to deal with invalidly adopted interpretations and policy statements. Just as courts have found a variety of ways to prevent retroactive changes in agency positions,[284] so too can they compel the agency to adhere to an interpretation or a policy that the agency wants to change. In other situations, such a result would be absurd; the court could permit the change, with or without a remand for a new rule-making proceeding.

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[278] *See* text at notes 114-19 *supra.*

[279] *See* text at notes 82-87 *supra.*

[280] *See* City of New York v. Diamond, 379 F. Supp. 503 (S.D.N.Y. 1974); Gardner v. Tarr, 341 F. Supp. 442 (D.D.C. 1972).

[281] A bill, which has been favorably reported by the House Judiciary Committee, contains a provision in respect to rules adopted without appropriate procedures that "no person shall be required to resort to or be adversely affected by such a rule, nor may such a rule be admitted into evidence or considered in any agency proceeding or any judicial review of such proceeding . . . ." H.R. 12048, 94th Cong., 2d Sess. (1976). See H.R. Rep. 94-1014, pt. 1, 94th Cong., 2d Sess. 51 (1976).

[282] *See* NLRB v. Wyman-Gordon Co., 394 U.S. 579 (1969); NLRB v. APW Prods. Co., 316 F.2d 899 (2d Cir. 1963).

[283] *See* text at notes 63-64 *supra.*

V. Conclusion

The courts have pursued inconsistent theories in evaluating claims by the public that preadoption procedures should have been employed in the adoption of interpretive rules and policy statements. Some of them have looked only to legal effects and labels; this achieves some predictability of result, but at the cost of rejecting well-founded claims that the public was wrongfully excluded from the agency's deliberative processes. Other courts have considered only the practical impact of the rule. This approach insures public participation in rulemaking but injects an element of unpredictability.

Abolition of the present statutory exemption would not serve the interests of the public or the agency. Repeal of the exemption would have an adverse effect on the functioning of the federal government; its disadvantages would clearly outweigh its advantages. Moreover, repeal would probably lead to overuse of the good cause exemptions, thereby inviting obstructionist litigants to abuse the system and possibly excluding the public to nearly the same degree as it is presently excluded. It would be far better to create a new system for postadoption comment and mandatory agency responses. Such a provision would realize most of the benefits of preadoption commentary without imposing severe costs and delays and possibly driving much rulemaking underground. As part of a needed reform of the rule-making provisions of the APA, such a system deserves sympathetic consideration by Congress.

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[284] *See* text at notes 244-53 *supra.*

REPORT IN SUPPORT OF RECOMMENDATION 77-1

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CONGRESSIONAL CONTROL OF ADMINISTRATIVE REGULATION: A STUDY OF LEGISLATIVE VETOES

Harold H. Bruff * *and Ernest Gellhorn* **

Several administrative programs contain provisions allowing Congress to veto agency rules, and there is now a bill before Congress to extend this veto power to all agency rulemaking. In this Article, Professor Bruff and Dean Gellhorn analyze the histories of five federal programs subject to the legislative veto to determine the effect of the veto on the rulemaking process and on the relationships between the branches of government. Extrapolating from this practical experience, they suggest that a general legislative veto is unlikely to increase the overall efficiency of the administrative process, may impede the achievement of reasoned decisionmaking based on a record, and may encourage violation of the principle of separation of powers, the doctrine of limited delegation of congressional authority, and emerging concepts of due process in administrative law.

COMPLAINTS of a malaise in the administrative process and calls for regulatory reform are not new.[1] Recently, however, these attacks on government regulation have been renewed with special fervor. Numerous cures have been proposed, ranging from general deregulation to sunset and sunshine bills.[2] One idea receiving special attention in Congress has been a proposed amendment to the Administrative Procedure Act (APA) [3] providing that substantive rules issued pursuant to the notice-and-comment procedures of 5 U.S.C. § 553 must be submitted to Congress for review before taking effect.[4] Then, if either house of Congress (or both houses, under some proposals) should disapprove a proposed rule within a specified period, such as sixty days, it would not take effect. The purpose of this "legislative veto," which would not require the concurrence of the President, would be to give Congress an opportunity to void administrative regulations which, in its judgment, exceed statutory authority or implement unsound policy.[5]

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[1] *See generally* Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947 (1971). Even the term "malaise" has a pedigree. *See* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 2–3 (1962).

[2] Sunset laws would require periodic renewal of the authorization of agency programs. They take their name from the fact that they would allow the "sun to set" on particular programs unless their renewal is justified and authorized. *See generally* Adams, *Sunset: A Proposal for Accountable Government*, 28 AD. L. REV. 511 (1976).

Sunshine laws provide for open administration by requiring that agency meetings be public and on the record. The recent federal sunshine law also forbids ex parte communications in adjudicative proceedings. Government in the Sunshine Act, Pub. L. No. 94–409, § 4(a), 90 Stat. 1241 (1976) (to be codified in scattered sections of 5 U.S.C.).

In recent years, Congress has added legislative veto provisions to an increasing number of laws governing agency action.[6] Most of these statutes involve executive action other than rulemaking; they range in subject matter from the reorganization of the executive branch to the conduct of foreign affairs and the administration of public works programs. No legislative vetoes have been applied to adjudications, however, since they are constitutionally protected from direct congressional scrutiny.[7]

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[3] 5 U.S.C. §§ 551–706 (1970 & Supp. V 1975).

[4] Such a bill reached the floor of the House at the close of the 94th Congress, under a procedure requiring a suspension of the rules and a two-thirds vote to pass it. The bill failed to receive the two-thirds vote by a narrow margin. H.R. 12048, 94th Cong., 2d Sess., 122 CONG. REC. H10666–90, H10718–19 (1976). *See generally* H.R. REP. NO. 94–1014, 94th Cong., 2d Sess. (1976); *Congressional Review of Administrative Rulemaking: Hearings on H.R. 3658, H.R. 8231 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Congressional Review Hearings*]; *Improving Congressional Oversight of Federal Regulatory Agencies: Hearings Before the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. (1976).

[5] These two objectives of a legislative veto may be difficult to separate in practice. *See, e.g.*, W. CARY, POLITICS AND THE REGULATORY AGENCIES 45 (1967) (congressional objections to the wisdom of agency policy are often phrased in terms of its legality). *See also* p. 1419 *infra*.

Examples of recent regulations with little popularity in Congress include seatbelt interlock requirements ultimately reversed by legislation, *see* Motor Vehicles and Schoolbus Safety Amendments of 1974, Pub. L. No. 93–492, 88 Stat. 1470 (codified at 15 U.S.C. § 1410b(b)(1) (Supp. V 1975)), and Environmental Protection Agency regulations that would have severely limited parking and automobile traffic in downtown Boston and Los Angeles, *see Congressional Review Hearings, supra* note 4, at 141, 264, 426–30.

[6] These provisions take a wide variety of forms, including requirements for congressional or committee approval of agency action. *See generally* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975); CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, CONGRESSIONAL REVIEW, DEFERRAL AND DISAPPROVAL OF EXECUTIVE ACTIONS: A SUMMARY AND AN INVENTORY OF STATUTORY AUTHORITY (1976); H.R. DOC. NO. 416, 93d Cong., 2d Sess. 753–819 (1974).

Since 1972, Congress has extended the legislative veto to a series of agency programs involving rulemaking. Most of the current federal experience with legislative veto of rulemaking has occurred in five programs: [8] the Office of Education's establishment of family contribution schedules for its program of basic grants for postsecondary education; the Department of Health, Education, and Welfare's rules issued under the General Education Provisions Act since 1974; the Federal Energy Administration's exemptions from price and allocation controls on petroleum products; the General Services Administration's regulations regarding public access to the papers and tapes of the Nixon Presidency; and all of the Federal Election Commission's rules governing the conduct and financing of campaigns. The proposals currently before Congress would substitute a legislative veto having broad applicability to rulemaking for this ad hoc approach.

This Article examines the history of these five programs in order to appraise the desirability and the constitutionality of applying the legislative veto to rulemaking. After providing some background, we focus on the case histories and the lessons to be learned from them. We then proceed to a necessarily more speculative discussion of the long term institutional effects of a broad legislative veto provision. Would it, for example, shift the focus of rulemaking from the agencies to Congress? What would be its effects on the agencies, on Congress, and on the courts — and on the interrelationship of the three branches of government?

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[7] *See* Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

The term "adjudication" as used herein means a full evidentiary hearing governed by §§ 5, 7 & 8 of the APA, 5 U.S.C. §§ 554, 556, 557 (1970 & Supp. V 1975). Unless otherwise indicated, "rulemaking" means informal rulemaking governed by § 4 of the APA, 5 U.S.C. § 553 (1970 & Supp. V 1975), and not formal rulemaking, a relatively rare procedure in which a statute explicitly subjects rulemaking to the APA's adjudication procedures. The term "executive action" is used for matters not within the APA's special procedural requirements for rulemaking or adjudication. These technical matters are further elaborated in Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 39–41 & nn.12–14 (1975).

[8] Experience with the legislative veto is examined in detail in Part II *infra*. *See* note 46 *infra*.

Legislative veto provisions are also found in some of the states and in the British Commonwealth. *See generally* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 122–27 (6th ed. 1974). We did not subject them to empirical inquiry, and make only occasional reference to them here.

I. THE BACKGROUND: CONSTITUTIONAL, STATUTORY, AND POLICY ISSUES SURROUNDING THE LEGISLATIVE VETO OF RULEMAKING

Any proposal to impose broadly applicable limits on agency authority to develop policy is intimately related to the long struggle of administrative agencies for legitimacy and independence. American attitudes toward the agencies have always demonstrated a fundamental ambivalence. On one hand, administrative agencies are viewed as necessary vehicles for the development of policy and are often created to resolve issues that Congress is unwilling or unable to decide. They are expected to develop experience and specialized knowledge and to provide efficient administration of complex and burdensome tasks. On the other hand, Americans are suspicious of delegation of lawmaking authority to agencies, which seems inconsistent with the Constitution's allocation of the responsibility for lawmaking to Congress. An assessment of the legislative veto of administrative regulations requires an understanding of its place within the statutory and constitutional scheme that has evolved to define the role of the agencies.

A. The Legislative Veto as a Substitute for the Delegation Doctrine

Over the course of time, constitutional doctrine has developed to support administrative lawmaking. The courts have come to recognize that it is impractical for the legislature to make the innumerable policy decisions necessary to the daily operation of a large and complex government. Therefore, modern courts applying the delegation doctrine, which theoretically limits congressional grants of power to the agencies, have rejected ancient and rigid dicta that the lawmaking power vested in Congress may not be delegated elsewhere.[9] Today the courts purport to require only that statutory delegations of congressional authority contain basic policy standards for the administrator to follow. This "standards" requirement is designed to preserve the separation of powers by placing broad policy determinations in the hands of elected representatives rather than appointed bureaucrats and by facilitating judicial review. Yet even this minimal requirement has proved to be unworkable in practice. Almost without exception, the courts have refused to enforce constitutional constraints on congressional delegations of lawmaking authority to the agencies. The Supreme Court has been unwilling to require Congress to specify policy standards as clearly as possible, or to revise broad standards as experience permits. The result is that lawmaking power is now lodged in administrative hands without any constitutional assurance that the agencies are responsive to the people's will.[10]

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[9] *See, e.g.*, Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 341–42 (1974). *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.01–.03 (Supp. 1970); G. ROBINSON & E. GELLHORN, THE ADMINISTRATIVE PROCESS 102–06 (1974).

The legislative veto can be viewed as a mechanism to help fill the void left by the decline of the delegation doctrine. Its purpose is to limit agency rulemaking authority by lodging final control in Congress. But instead of controlling agency policy in advance by laying out a roadmap in the statute creating the agency, Congress now proposes to control policy as it develops in notice-and-comment rulemaking, after the agency's expert staff and interested members of the public have had an opportunity to assist in its formation. In this way Congress can be fully informed before primary policy is decided. Still, the legislative veto is only a negative check on policies proposed by the agencies, not a means for making policy directly.

B. Separation of Powers

Legislative veto provisions raise a series of constitutional questions involving the separation of powers. Chief among these is whether legislative vetoes constitute an impermissible evasion of the President's veto authority, or an impermissible intrusion into the powers vested in the executive or judicial branches of government (depending on whether the veto is meant for policy or legality review).[11] Supporters of the legislative veto argue that since it is a control on administrative lawmaking similar to that which the delegation doctrine purports to impose, it is fully consistent with the separation of powers. They emphasize that the branches of government are not wholly separated but often have a limited role in one another's functions.[12] For example, the President's veto gives him a role in legislation; the power of advice and consent gives the Senate a role in administration. If, then, the legislative veto device gives Congress an appropriately limited role in the executive function, it constitutes an appropriate counterweight to broad delegation. By returning policymaking authority to Congress, it helps preserve the separation of powers. Opponents argue that legislative vetoes are functionally like legislation in that they foreclose otherwise permissible readings of statutes. To foreclose such interpretations similarly by legislation would require the approval of the President or the concurrence of two-thirds of both houses of Congress to override his veto. Thus legislative vetoes passed without presidential concurrence arguably abridge the President's role in the legislative process.[13] Furthermore, for Congress to pass on the legality of administrative rules may usurp the judicial function.[14]

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[10] Congress does, however, possess a variety of "oversight" devices. Agency action is affected by legislative appropriations, congressional investigations, the continuing supervision of the standing or special committees, and the operation of the appointments process, including the power of advice and consent. In addition, Congressmen often play an "ombudsman" role by interceding with the agencies on behalf of interested constituents. *See generally* W. GELLHORN & C. BYSE, *supra* note 8, at 109–22.

[11] *See generally* Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEGIS. 593 (1976), and sources cited therein at 593 n.1.

[12] *See, e.g., id.* at 598–601. *See generally* Buckley v. Valeo, 424 U.S. 1, 120–23 (1976) (per curiam opinion).

If a single house may veto regulations, the fundamental principle of bicameralism may be violated. The Constitution lodges legislative authority in a bicameral Congress, in part as an internal check against the aggrandizement of congressional power.[15] Proposals allowing one house to veto administrative regulations appear to circumvent that check.[16] Since the legislative veto is designed as a negative constraint on policy-making, however, supporters argue that it gives each house no more power than the bicameral system, under which legislation may also be blocked by either house. They also emphasize that the statute authorizing the legislative veto must itself be passed by the normal legislative process involving concurrence of both houses and presidential approval or veto override.[17] Nevertheless, Congress cannot by legislation alter the bicameral system engraved in the Constitution. Moreover, the substantive policy created by the agency's rule, if within the bounds of the statutory delegation, arguably had the approval of both houses and the President in the original delegation. To the extent that a legislative veto by a single house may redirect this policy, serious questions are raised about the veto's consistency with the Constitution's legislative scheme.

Whether the legislative veto will founder upon these constitutional objections is unclear. Although Mr. Justice White rejected them in his concurrence in *Buckley v. Valeo*,[18] a majority of the Supreme Court specifically left the question for another day.[19]

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[13] *See, e.g., Congressional Review Hearings, supra* note 4, at 376–78.

[14] *See* pp. 1429–31 *infra*.

[15] THE FEDERALIST No. 49, at 315–16 (J. Madison) (New American Library ed. 1961).

[16] *See* Watson, *supra* note 6, at 1032–36.

[17] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 286 (1976) (White, J., concurring).

[18] *Id.* at 284–86 (White, J., concurring).

[19] *See id.* at 140 n.176 (per curiam opinion).

The Court of Claims, however, recently has upheld the constitutionality of a one-house veto.[20]

C. The Legislative Veto in Context: Developments in Rulemaking

The Administrative Procedure Act provides generally applicable procedural constraints for the agencies' delegated policymaking. It thus defines the procedural context in which an increased congressional involvement in rulemaking functions. The basic assumption upon which the APA rests is that policy is developed and applied in one of two ways: by adjudication or by rulemaking.[21] Most agencies have broad discretion to choose which approach is more suitable.[22] However, this bipolar analysis reflects the formal structure more than the reality of the administrative process. Much agency action is neither adjudication nor rulemaking: the APA does not provide special procedures for executive actions such as consent settlements, policy statements, and contracts. Nevertheless, the APA's constraints are important. Adjudication must adhere to most of the common law safeguards of a trial, including notice of the charges, a hearing before an unbiased tribunal, and an opportunity to present evidence and to challenge or rebut contrary proof. The ultimate findings and decision must be supported by the record. Informal rulemaking, in contrast, has traditionally required only published notice of a proposed rule, an opportunity to comment on it, and a concise statement of the basis and purpose of the final rule.[23]

During the past several decades, the procedures of formal adjudication have become increasingly elaborate and time-consuming. They have therefore seemed ill-suited to many new regulatory programs in such fields as environmental protection; Congress accordingly has set the agencies administering them on a course of rulemaking. Whether spurred by Congress or on their own initiative, agencies have relied increasingly on rulemaking or other informal executive action rather than on adjudication.[24] Because the APA has few explicit procedural requirements for such activities and because no formal record is required, judicial review has been difficult.[25] Courts have responded to this challenge by importing procedural requirements into various informal proceedings on both constitutional and statutory grounds.[26] Illustrative of this broader trend is a series of cases imposing new procedural requirements for informal rulemaking.[27] These judicial requirements have been summarized as follows:

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[20] Atkins v. United States, 45 U.S.L.W. 2560 (Ct. Cl. May 18, 1977). *See generally* Clark v. Valeo, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977) (en banc), *aff'd mem. sub nom.* Clark v. Kimmitt, 45 U.S.L.W. 3789 (U.S. June 6, 1977).

[21] *See* note 7 *supra.*

[22] *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). The governing statutes of a few agencies, however, require rulemaking for the formulation of policy. *See Congressional Review Hearings, supra* note 4, at 426, 478, 480.

[23] *See* 5 U.S.C. § 553 (1970).

[24] *See generally* Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

> First, both the essential factual data on which the rule is based and the methodology used in reasoning from the data to the proposed standard must be disclosed for comment at the time a rule is proposed . . . . Second, the agency's discussion of the basis and purpose of its rule — generally contained in the "preambles" to the notices of proposed and final rulemaking and in the accompanying technical support documents — must detail the steps of the agency's reasoning and its factual basis. Third, significant comments received during the public comment period must be answered at the time of final promulgation . . . . Fourth, only objections to the regulations which were raised with some specificity during the public comment period, and to which the agency thus had an opportunity to respond, may be raised during judicial review.[28]

Congress has also imposed special procedural requirements beyond those in the APA in several recent delegations of rulemaking power, in order to assure that agencies have fully considered the issues and proposed solutions. For example, the Federal Trade Commission's new rulemaking authority includes requirements for cross-examination and specific findings based on evidence in the record.[29]

Several purposes are discernible in these new statutory and judicial requirements. One is to assure fair treatment of persons submitting comments by requiring actual agency consideration and response. A second is to foster reasoned agency decisionmaking by exposing thinking within the agency to public criticism and by requiring reasoned resolution of the issues. A third is to facilitate judicial review by providing a record to justify a final rule.[30] Obviously, these purposes are closely intertwined.

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[25] Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 754–55 (1975).

[26] *See* Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1976); Pedersen, *supra* note 7, at 46–50.

[27] Home Box Office, Inc. v. FCC, No. 75-1280 (D.C. Cir. March 25, 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973); International Harvester, Inc. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972); General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). *See generally* Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

[28] Pedersen, *supra* note 7, at 75–76 (footnotes omitted).

[29] 15 U.S.C. § 57a(b), (c) (Supp. V 1975). This provision of the Federal Trade Commission Improvement Act granted express statutory authority to the FTC to conduct rulemaking proceedings, but pursuant to stringent procedural requirements. *See also* Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (1970 & Supp. V 1975) (in particular, § 655 concerning rulemaking).

Introducing legislative veto provisions into this scheme raises issues at the foundation of modern rulemaking. To what extent is rulemaking a normative or political process which is brought closer to the people's representatives by the legislative veto, and to what extent is it an expert or rational process that should not be subject to "political" influences? Recent commentators have attacked the "naive" view of rulemaking which characterizes it as a decision by experts divorced from political considerations.[31] They emphasize that there is no ideal resolution of policy in service of some unitary public interest; there are only resolutions of greater or lesser acceptability to experts and to the various interest groups that make up the American public.[32] Certainly the notice-and-comment portion of the rulemaking process retains some "legislative" characteristics, in that anyone affected by a proposed rule may make his views known, although tinged by self-interest. Yet whatever the role of political conflict, the premises of democracy demand that it be in the open. There is ample justification for procedural constraints on rulemaking to exclude unseen political influences.

The new statutory and judicial requirements thus seek to exclude secret influences and to assure the openness of the rulemaking process. Their premises are that a meaningful statutory standard, or at least rationality review by the courts, constrains the substance of the resulting rules, and that the agency staffs have a contribution to make in formulating rules even if they are not Solomonic. Any statutory provision for a legislative veto should be evaluated for consistency with these emerging aims of the rulemaking process. Of particular importance to the courts is that there be some sort of agency record for review and that information in the record be the exclusive basis for decision.[33] When a legislative veto system is implemented, informal contacts between the agency and the committees, staff personnel, and members of Congress may increase. By their very nature these contacts are likely to be secret, or at least undisclosed by the administrative record. If the result is to deny interested persons fair treatment, to deflect an agency from its statutory grounds for decision, or to impair the ability of the courts to review rules, a violation of due process or the governing statute may result.[34] A careful examination of the actual interactions between Congress and the agencies that occur in the presence of a legislative veto provision is therefore necessary to a judgment of the desirability and constitutionality of the veto.

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[30] All of these themes can be found in Home Box Office, Inc. v. FCC, No. 75-1280, slip op. at 49–51, 90–92 (D.C. Cir. March 25, 1977).

[31] *See generally* Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 778–79 & n.22 (1975); Noll, *Breaking Out of the Regulatory Dilemma — Alternatives to the Sterile Choice*, 51 IND. L.J. 686, 689 (1976).

[32] *E.g.*, Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1063 (1975); Noll, *supra* note 31, at 689.

[33] Home Box Office, Inc. v. FCC, No. 75-1280, slip op. at 89–90 & nn.118–19 (D.C. Cir. March 25, 1977).

D. Policy Issues Surrounding Legislative Veto Provisions

So far, we have discussed only the theoretical consistency of the legislative veto technique with the statutory and constitutional schemes governing the agencies. There seems to be no clear a priori answer to the question of the constitutionality of the veto or its consistency with the statutory scheme of administration. Therefore, any decision to apply it broadly to administrative rulemaking in general should rest partly on an informed judgment regarding its likely effects in practice on the agencies, the courts, and Congress. Before examining case studies of five programs for which Congress has adopted the technique, we outline the policy issues surrounding legislative veto proposals.[35] The purpose is to provide a frame of reference for analysis of the case studies, and to aid evaluation of their usefulness in predicting the effects of a more general veto provision.

A question of central importance is whether the addition of congressional review to administrative rulemaking will diminish the effectiveness of the other procedural checks which Congress and the courts have imposed on the rulemaking process. The problem is that the congressional review process may not be governed by rules as strict as those applicable to agency rulemaking. Present procedures might be replaced by a less visible or closed process of review by congressional committee members and staffs, as well as other interested Congressmen. And if interest groups can lobby Congress during the review period, their influence might render currently required public procedures for rulemaking ineffective. In any case, a veto statute may reduce public participation before the agencies by shifting the focus of attention to congressional review procedures. This is not meant to suggest that Congress need adopt the same procedures it imposes upon the agencies, thereby producing a largely redundant review process. It does suggest, however, that the differences between the legislative and administrative process may make it difficult to reconcile congressional review with other aspects of rulemaking.

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[34] *See* pp. 1433–37 *infra.*

[35] For an example of policy analysis of the effects of the legislative veto, see 2 SEN. COMM. ON GOVERNMENT OPERATIONS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION, 115–22 (Comm. Print 1977) [hereinafter cited as STUDY ON FEDERAL REGULATION].

An overall appraisal of a legislative veto provision must examine whether it helps to assure the acceptability of agency regulations to Congress as a whole. If review authority is actually exercised by congressional committees, which are less broadly representative than the full membership of either house, the intent of Congress as a whole may not be realized. The same may be true if committee action is not visible to the other members, so that there is no attention and assent to what the committees do.

Another fundamental issue is whether the opportunity for subsequent review of agency regulations will lessen pressure in Congress for specificity in legislation delegating rulemaking power. A purpose of legislative vetoes is to allow Congress to postpone deciding policy questions until a concrete resolution appears in the form of a proposed rule. Whether the effect of this approach is to increase or to decrease agency discretion will depend on the extent to which agency regulations receive actual review.

Delay is said to be a serious problem in rulemaking; Congress and the courts have often responded by imposing deadlines for promulgating rules.[36] The legislative veto creates an additional source of delay because rules must lie before Congress for the statutory period whether or not there is serious consideration of a veto. It is difficult to estimate the costs of delay in promulgating rules that lie before Congress without awakening actual review. Such costs seem likely to vary in their visibility and their seriousness. And they would be without any corresponding benefit unless the very presence of review authority improves the drafting process by increasing agency attention to the acceptability of rules to Congress.

When review of a rule does occur, irreconcilable differences in policy between the agency and Congress may lead to long-term impasses. As a result, the implementation of administrative programs may be considerably delayed or entirely thwarted. Thus, it is important to appraise whether active congressional review will tend to produce the speedy resolution of policy. This will depend on the time between rules submissions and vetoes, and on the willingness of agencies to modify vetoed rules in accordance with the will of Congress. Agencies may respond to the possibility of program interruption through legislative vetoes by using adjudication rather than rulemaking to form policy. If so, delay problems may be exacerbated by the increased use of slow adjudicative processes.

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[36] *Id.* at 118.

In addition to increasing delay in the administrative process, legislative veto authority may also increase Congress' already considerable workload. Much of the work of screening regulations for review must be done by hired staff, rather than committee members; consequently, already burdened staffs would have to be enlarged to implement a generally applicable veto.[37] Furthermore, especially where proposed rules deal with complex and technical subjects, the review process itself may be difficult and time-consuming for the members of Congress. Hearings must be held and committee reports written. If a veto resolution is reported to the floor, there must be study, debate, and a vote. Whether a significant number of rules would reach this stage remains to be seen, but there is the potential for an alarming increase in the volume of Congress' business.

A final concern is that of the legislative veto's effect on judicial review. The failure of Congress to veto a rule might be construed as its ratification, and a court might feel bound to defer to Congress' implied judgment that the rule is not ultra vires or irrational.[38] But congressional review may turn either on these legality considerations or on a rule's soundness as a matter of policy — and the nature of judicial review may depend on the nature of congressional review. Courts may be more reluctant to question the judgment of Congress where review is based on considerations of policy than where it is purportedly limited to questions of statutory intent, which are within the traditional province of the courts. Moreover, the extent of a court's scrutiny may depend on whether the rule received careful examination in Congress, at least by a committee, or was not reviewed at all. If the judiciary defers to agency rulemaking on a theory of implied ratification by Congress, there may result a net loosening of constraints on agency discretion whenever rules have received little direct examination in Congress.[39] All of these legal questions would complicate the process of judicial review, and their resolution might entail close judicial scrutiny of the internal workings of Congress.

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[37] It has been suggested, however, that in the past vetoes have been infrequent enough to permit reliance by staff members on political controversy to bring a rule to their attention. *See id.* at 121. The statement in text assumes that Congress would attempt more systematic screening under a general veto.

[38] Somewhat analogously, it has been argued that congressional reenactment of the Internal Revenue Code constitutes ratification of existing Treasury Regulations. *See* K. DAVIS, ADMINSTRATIVE LAW TREATISE § 5.10 (1958).

[39] *See* pp. 1426–28, 1431 *infra*.

II. Five Case Studies

Theoretically, the legislative veto is a simple congressional check on an agency's execution of its statutory mandate. The term "veto" brings to mind a process as quick and easy as a presidential veto — an action considered in isolation by a separate branch of government and exercised independently. In practice, the process by which legislative vetoes are exercised is neither simple nor entirely independent; rather it is part of the complex legal and political relationship between the agencies and Congress.[40]

Congress often includes veto provisions in legislation because it mistrusts the agency's intentions or is displeased with the agency's past decisions in a politically sensitive area.[41] Another reason for the veto is congressional indecision on major issues of program implementation, and a consequent wish to delegate broadly while retaining a means of policing agency policy initiatives.[42] These motives may coexist.[43] In any event, the advent of the veto procedure changes the balance of power between Congress and the agency. The full legislative process, including approval by both houses and either approval by the President or override of his veto, is no longer necessary to alter agency policy. Still, the passage of an actual veto resolution may be nearly as cumbersome and time-consuming for either house as legislation. The usual process is for one or more committees or subcommittees to hold hearings and to report to the full house, which debates the matter before a final vote.[44] Thus, it is in the interest of both Congress and the agency to avoid invoking the formal veto process if informal accommodation can be reached.

Because of this mutual desire for accommodation, the potential for a veto engenders a process of negotiation and compromise between Congress and the agency concerning the substance of forthcoming rules. This has several effects. First, since congressional committees give veto resolutions initial consideration, most of the activity occurs at the committee or subcommittee level.[45] Second, to the extent that rules already formulated by an agency are altered in negotiations with Congress, the agency's consideration of public comment in drafting the rule may be displaced. Third, interests dissatisfied with the results of the agency's notice-and-comment proceedings have a second opportunity to affect the rule by applying pressure in Congress. Finally, the congressional review process and the consultations which it engenders place great demands on the time and energy of both the agency and Congress.

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[40] *See generally* 2 Study on Federal Regulation, *supra* note 35 (overview of agency-Congress relationship).

[41] *See* pp. 1383, 1397–98, 1405 *infra*.

[42] The energy statutes, *e.g.*, 15 U.S.C. §§ 751–760 (Supp. V 1975); 42 U.S.C. §§ 6201–6422 (Supp. V 1975), provide the best example of this.

[43] *See* p. 1383 *infra*.

[44] Time constraints can lead to omission of some of these steps. *See* p. 1395 *infra*.

In this Part, we examine how the legislative veto has worked in practice in five federal programs involving rulemaking, in order to identify the veto's effects on the relationship between Congress and the agencies and on the nature of the rulemaking process. The studies cover a period from the inception of veto authority in each program to the close of the Ninety-Fourth Congress in October 1976.[46]

A. The Department of Health, Education, and Welfare and the Basic Educational Opportunity Grants Program

Among the agencies we studied, the Department of Health, Education, and Welfare (HEW) was the most successful in running the gauntlet of the legislative veto. It was the only agency to avoid suffering any actual vetoes, in part because it changed its rules substantially under congressional pressure. The reasons for HEW's success, and for the greater difficulties encountered by the others, were partly political and partly inherent in the nature of the programs involved.

HEW's Office of Education (OE) administers a wide variety of federal programs of aid to education. Because of recent difficulties of state and local governments in supporting education, federal funds have been in great demand. Their distribution has consequently been a sensitive political issue; Congress has maintained a lively interest in administration of the programs. But legal controls have not always kept pace. Because the OE's activities concern federal grants, its rules governing them fall within an exception to the APA's procedural requirements for rulemaking.[47] Free from the constraints of the APA, the OE caused congressional dissatisfaction by administering programs of aid under unpublished rules or without any rules at all.[48] Although the Department voluntarily adopted public rulemaking procedures in 1971,[49] in the following year Congress attached a legislative veto to the OE's new program of Basic Educational Opportunity Grants for postsecondary education.[50] This first application of veto authority to a federal program involving rulemaking resulted not only from congressional mistrust of HEW in its handling of aid to students, but also from substantial disagreement in the Conference Committee regarding how the program should be administered.[51]

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[45] Congressional oversight of agency action also centers in the committees in the absence of a veto provision, but there are some differences. *See* pp. 1386–87, 1389, 1422–23 *infra*.

[46] The five programs were chosen because they had generated enough rulemaking experience for empirical investigation of the effects of the veto provision. There are other legislative vetoes in statutes governing federal rulemaking, but there had been no significant experience pursuant to them in May 1976, when our investigation commenced. *E.g.*, Act of October 27, 1974, Pub. L. No. 93–942, 88 Stat. 1470 (automobile passive restraints).

The basic grants program supports college students by paying up to half of an undergraduate's educational costs, after subtraction of his family's expected contribution for the year. The statute requires the Commissioner of Education to publish a schedule of expected family contributions in the Federal Register by a date well in advance of the academic year involved.[52] It also requires an opportunity for public comment on the schedules, and allows them to take effect on a specified date unless vetoed sooner by either house of Congress.

During the first year of the new program, there were extensive informal meetings on the content of the family contribution schedules between the Office of Education and the staff of the House and Senate committees having substantive responsibility for the program.[53] The OE's policies seem eventually to have prevailed in most of these discussions.[54] Negotiation has since diminished, occurring mostly around the yearly hearings. The practice of the House committee has been to introduce a pro forma resolution of disapproval each year in order to trigger the hearings and an explicit decision on the schedules.[55] The Senate has also held yearly hearings, but without introducing veto resolutions. Although there has been no formal consideration of the schedules beyond the subcommittee level in either house, and no serious attempt at a veto, the negotiations and hearings have allowed searching review of the OE's regulations. Review of the schedules has often been characterized by subcommittee members as limited to questions of legality, but the actual emphasis has been on policy.

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[47] *See* 5 U.S.C. § 553(a)(2) (1970).

[48] Sky, *Rulemaking and the Federal Grant Process in the United States Office of Education*, 62 VA. L. REV. 1017, 1041 (1976).

[49] *See* 36 Fed. Reg. 2532 (1971).

[50] 20 U.S.C. § 1070a(a)(3)(A)(ii) (Supp. V 1975).

[51] Interview with Peter Voight, Director, Division of Basic Grants, Office of Education, in Washington, D.C. (May 26, 1976) [hereinafter cited as Voight interview]. The conference report explaining the statute does not give reasons for the presence of the veto provision. S. CONF. REP. No. 798, 92d Cong., 2d Sess. 167 (1972).

The statute also contains controls on the OE other than the veto provision, principally requirements that the agency review its rules and reissue them after opportunity for public comment, *see* 20 U.S.C. § 1232 (1970 & Supp. V 1975), and a provision for General Accounting Office evaluations and audits of federal education programs, 20 U.S.C. § 1227(a) (Supp. V 1975). *See generally* Sky, *Rulemaking in the Office of Education*, 26 AD. L. REV. 129 (1974).

[52] 20 U.S.C. § 1070a(a)(3)(A)(i) (Supp. V 1975), *as amended by* Act of Oct. 12, 1976, Pub. L. No. 94-482, § 121(c), 90 Stat. 2091.

[53] Interview with Christopher Cross, Senior Education Consultant for the Minority, House Comm. on Education and Labor (then Deputy Assistant Secretary for Legislation (Education), HEW), in Washington, D.C. (May 25, 1976) [hereinafter cited as Cross interview]; Interview with Jean Frohlicher, Counsel for the Senate Comm. on Labor and Public Welfare (then Deputy Associate Commis-

The schedules, though complicated, reflect specific normative principles; the subcommittees have demonstrated keen understanding of the schedules and have displayed no diffidence in disagreeing with the OE on matters of substance. Congressional review has focused on issues central to the equity of the grants. There has been steady congressional pressure to increase the number of persons eligible for the grants and the OE has changed its family contribution schedules in response to this pressure every year except 1976.[56] Usually the pressure has worked to increase the amount of reserved assets which need not be included in calculating a family's expected contribution. Pressed by constituents, the subcommittees have urged that certain assets, such as a family's equity in its home or farm, should be excluded because they are not realistically available for educational expenses.

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sioner for Legislation, OE), in Washington, D.C. (May 21, 1976) [hereinafter cited as Frohlicher interview]; Voight interview, *supra* note 51.

[54] Voight interview, *supra* note 51.

[55] *See Congressional Review Hearings, supra* note 4, at 460; *Hearings on H.R. 204 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 8, 123 (1973). In 1976, there were no hearings on the schedules in either house because the Education Amendments of 1976 took precedence. OE received informal notice from the subcommittees that no action to disapprove the schedules would occur. Letter from Christopher Cross, Senior Education Consultant (Minority), House Committee on Education and Labor, to H. Bruff (Nov. 2, 1976).

[56] *See Hearings on Examination of the Family Contribution Schedule for the Basic Educational Opportunity Grant Program for Use in Academic Year 1975–76 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 3 (1974); *Hearings on H.R. 745 Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975). In 1976, the pending Education Amendments precluded close attention to the schedules. *See* note 55 *supra*. There were no changes in them attributable to negotiations with the committees. Letter from Richard A. Hastings, Deputy Assistant Secretary for Legislation (Education), HEW, to H. Bruff (Nov. 22, 1976).

The subcommittees have not necessarily agreed with each other, however. In one year, pressure to increase farm assets reserves came from the Senate while pressure to increase home equity reserves came from the House, creating a distinct possibility of deadlock.[57] The agency defused the controversy by raising both reserves, which lowered grants for other applicants. In thus moving the basic grants program in a substantive direction that broadens the participation of large blocs of voters, the subcommittees have opened themselves to the charge of modifying the original legislation to appease interest groups.

In the review process, time pressure has fostered compromise, since everyone has known that if timely approval of the schedules were not to occur, the entire program would be in jeopardy.[58] The agency has found a bargaining ploy in the cyclical fiscal year pattern. Each year it offers to meet the expressed concerns of the subcommittees part way; a compromised issue can be dealt with again the following year. These characteristics may have encouraged the subcommittees to avoid reporting out veto resolutions in order to preserve their negotiating stance with the agency. Another consequence may be to give the OE more control over its destiny than would otherwise seem apparent, by allowing it to forestall cohesive opposition to the schedules. Overall, the OE and the subcommittees have increasingly approached agreement on basic policy. Indeed, recent hearings in the Senate show signs that the OE may have formed an alliance with the subcommittee, which may now stand in defense of policy accommodations reached between the agency and the subcommittee against criticism generated by the public.[59]

B. The Department of Health, Education, and Welfare and the General Education Provisions Act

1. General Rulemaking. — In 1974, Congress amended the OE's organic statute, the General Education Provisions Act (GEPA),[60] to provide legislative veto authority over most OE rules (other than the family contribution schedules), and to some rules authorized by related statutes.[61] Affected rules were to be transmitted to Congress and would take effect forty-five days later unless disapproved by concurrent resolution for inconsistency with statutory authority.[62] The veto's purpose, according to the House report, was to arrest the agency's accumulation of quasi-legislative power and a corresponding attrition in Congress' ability to make law.[63] The veto was limited to ultra vires rules, and a detailed finding of illegality was expected to accompany a veto resolution.[64]

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[57] *See Congressional Review Hearings, supra* note 4, at 445; Interview with Richard A. Hastings, Deputy Assistant Secretary for Legislation (Education), HEW, in Washington, D.C. (May 20, 1976).

[58] Voight interview, *supra* note 51.

[59] *Hearings on Examination of the Family Contribution Schedule for the Basic Educational Opportunity Grant Program for Use in Academic Year 1976–77 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 20, 27 (1975).

[60] 20 U.S.C. §§ 1221–1233 (1970).

Negotiations similar to those at the inception of the basic grants program followed the adoption of the 1974 amendments to the GEPA. Though reluctant to engage in negotiations,[65] HEW was brought into an "exhaustive" series of about twenty meetings with congressional staff from both houses, in order to insure that the staff's views would be considered in drafting regulations.[66] Such negotiations were not confined, however, to programs subject to a legislative veto. Extensive meetings between congressional and departmental staff had occurred after enactment of the Rehabilitation Act of 1973,[67] which does not contain a veto provision. In all these instances, negotiations arose to meet the need for extensive sets of new regulations in the face of congressional dissatisfaction with past performance;[68] they succeeded in reducing interbranch confrontation and the underlying dissatisfaction.[69]

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[61] *See* 20 U.S.C. § 1232(d)(1) (Supp. V 1975). This veto power applies to activities under 20 U.S.C. §§ 1221d, 1221e, 1221e–1 (Supp. V 1975), and under title IX of the Education Amendments of 1972, 20 U.S.C. § 1232(f) (Supp. V 1975). The 1974 amendments also subject the OE's rules to the notice-and-comment provisions of the APA. 20 U.S.C. § 1232(b)(2)(A) (Supp. V 1975).

[62] The disapproval period runs without interruption except when either house adjourns for more than four days, whereupon a complicated set of provisions determines the applicable period. *See* 20 U.S.C. § 1232(d)(2) (Supp. V 1975).

After a veto, the agency must respond to Congress' veto findings in proposing any further rules. 20 U.S.C. § 1232(e) (Supp. IV 1974).

[63] H.R. REP. No. 805, 93d Cong., 2d Sess. 73 (1974).

[64] A later amendment added a directive to the courts not to construe a failure of Congress to adopt a concurrent resolution as approval of a rule, a finding of statutory consistency, or an action raising a presumption of validity. Act of Nov. 29, 1975, Pub. L. No. 94–142, § 7(a)(1), 89 Stat. 796 (amending 20 U.S.C. § 1232(d)(1) (Supp. V 1975)).

[65] Interview with Stephen Kurzman, Assistant Secretary for Legislation, HEW, in Washington, D.C. (May 25, 1976) [hereinafter cited as Kurzman interview]; Cross interview, *supra* note 53.

[66] *Congressional Review Hearings, supra* note 4, at 445.

[67] Interview with Darrel J. Grinstead, Office of General Counsel, HEW, in Washington, D.C. (May 20, 1975) [hereinafter cited as Grinstead interview]; Kurzman interview, *supra* note 65; *Congressional Review Hearings, supra* note 4, at 446, 454. The Rehabilitation Act of 1973 is codified at scattered sections of 29 U.S.C. (Supp. V 1975).

[68] Grinstead interview, *supra* note 67.

More recently, consultations between HEW and Congress have been institutionalized. The Department has adopted a form to identify proposed rules whose content may be politically sensitive, which serves to warn the Department's Executive Secretariat that the subcommittees should be contacted and their views ascertained.[70] This procedure has been used whether or not the proposed rule is subject to a veto provision and has occurred even before a notice of proposed rulemaking.[71] Guidance on the political acceptability of a rule can thus be sought in the absence of definitive statutory guidelines.[72]

The review process under the 1974 amendments has in large part operated outside the formal and open procedures that were presumably intended for it.[73] Although the 1974 amendments authorized review of many HEW rules, only the controversial title IX sex discrimination regulation, discussed below, has occasioned formal veto resolutions and hearings. For the other rules, the review process has consisted of negotiations between the agency and the members and staff of congressional subcommittees. There are several reasons for the willingness of Congress to compromise here. First, the statute provides that review extends only to questions of legality, and is therefore limited. Second, the presence of the constitutional question has encouraged the committees to avoid confrontation in favor of negotiation.[74] Third, the requirement for a concurrent resolution means that if either house is satisfied with HEW's position, the agency prevails.

The principal practical problem for the agency caused by the presence of the veto provision has been time. In the OE's programs of aid to education, the span of a fiscal year must include both rulemaking to govern grants and the grant award process itself, since the awards must be made within the fiscal year of appropriation to avoid a lapse of funding.[75] Thus, all the phases of rulemaking (drafting a proposed rule, public participation, drafting a final rule, and congressional review) and all the phases of the grant process (invitation of applications, processing, and award) must be completed within a year or less.[76] To save time, the OE began submitting proposed rules to Congress, so that the periods for congressional review and public comment would run concurrently.[77] Congress forbade the practice by amending the GEPA to require submission of final rules.[78] In a renewed attempt to expedite its processes, the OE has since invited grant applications against proposed rules,[79] with the understanding that the applications may require revision if the rules are changed in response to public comment. Any changes in the rules thus create a considerable administrative burden and may defeat the expectations of grant applicants. The end result of this streamlining process is a substantial administrative bias against changing rules in response to public comment.[80]

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[69] Frohlicher interview, *supra* note 53; Cross interview, *supra* note 53.

[70] *Congressional Review Hearings, supra* note 4, at 446; Kurzman interview, *supra* note 65.

[71] Kurzman interview, *supra* note 65. Congress has also offered its views to the agency during the public comment period, and has done so even for rules subject to a later transmittal for possible veto. *Id.*; Interview with A. Neal Shedd, Chief, Regulations Staff, Office of Education, HEW, in Washington, D.C. (May 24, 1976).

[72] Agency personnel emphasize the absence of statutory guidance. *E.g., Congressional Review Hearings, supra* note 4, at 443, 446–47, 451.

[73] *Id.* at 448, 454.

[74] Frohlicher interview, *supra* note 53. The bill's signing statement expressed doubts regarding the veto's constitutionality, Sky, *supra* note 48, at 1024 n.22, and HEW's transmittal letters have reminded Congress of the issue. *Hearings on H. Con. Res. 330 Before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 24–25, 36, 39 (1975) [hereinafter cited as *Title IX Hearings*].

2. Title IX. — The only HEW regulation to cause the introduction of resolutions of disapproval under the GEPA was the one implementing title IX of the Education Amendments of 1972,[81] which prohibits sex discrimination in educational programs receiving federal financial assistance. Title IX was adopted in conference, without hearings or a committee report to guide agency rulemaking.[82] It left unresolved such major issues as whether the ban on sex discrimination extended to interscholastic athletics.[83] Nevertheless, the statute directed the federal agencies administering aid to issue implementing regulations. Within HEW, this task fell to the Office for Civil Rights.

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[75] *See generally* Sky, *supra* note 48. The OE does not find it wise to initiate the rulemaking process until the experience of a prior year can be evaluated and the appropriation for the current year is known. If appropriations are passed after the start of a fiscal year, less than a year may be available for the process of making rules and awarding grants. Time pressure has been further exacerbated by the OE's practice of extending public comment periods beyond statutory minima. *See id.* at 1032 n.34; *Congressional Review Hearings, supra* note 4, at 456. Until the Education Amendments of 1976, the OE could waive public participation in an emergency under the "good cause" provision of § 4(b) of the APA, 5 U.S.C. § 553(b) (1970). This option may now be foreclosed by the Education Amendments of 1976, Pub. L. No. 94-482, § 405(b)(1), 90 Stat. 2081 (1976).

[76] Sky, *supra* note 48, at 1028, 1034, 1036-37. The OE is also subject to statutory rulemaking deadlines, which have recently been tightened. *Id.* at 1022.

[77] *Id.* at 1026. However, a "substantial" change in the final rule would occasion resubmission to Congress. *Title IX Hearings, supra* note 74, at 33-34.

[78] Act of Nov. 29, 1975, Pub. L. No. 94-142, § 7, 88 Stat. 796 (amending 20 U.S.C. § 1232(d) (Supp. IV 1974)).

[79] Sky, *supra* note 48, at 1029, 1033-34.

[80] *Id.* The practice of submitting proposed rules to Congress would have a similar effect.

[81] 20 U.S.C. §§ 1681-1682 (Supp. V 1975). For the final rule promulgated under this title, see 40 Fed. Reg. 24127 (1975).

Although legislative veto provisions were not made applicable to regulations under title IX until two years later,[84] the open-endedness of the delegation and the controversial nature of the subject matter made consultation with Congress desirable. The agency therefore engaged in discussions with congressional staff to aid development of a proposed rule.[85] Like the negotiations following enactment of the Rehabilitation Act of 1973, these discussions confirm that interbranch negotiation is not always associated with a legislative veto.[86]

Because of the controversial nature of the subject, the agency provided an extraordinary 120 days for public comment on the proposed rule, and the response was enthusiastic.[87] A lively debate in Congress and among the public ensued. While public comment was being received and considered, agency personnel met with members and staff of committees of both houses of Congress, and the Secretary met with Congressmen.[88] The Department requested suggestions and, in response to them, made certain changes in the rule which were desired by Senator Bayh and some women's organizations.[89] Among these changes was a requirement that institutions receiving grants conduct self-evaluations in the elimination of discrimination. One can only speculate whether the women's groups would have achieved the same changes without resorting to congressional pressure.[90]

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[82] S. REP. NO. 798, 92d Cong., 2d Sess. 221–22 (1972). *See generally* 28 CONG. Q. ALMANAC 385–98 (1972); 121 CONG. REC. S12006 (1975) (Sen. Helms); Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. REV. 113, 142–45 (1976) [hereinafter cited as *Ultra Vires Challenges*]; Buek & Orleans, *Sex Discrimination — A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1 (1973).

[83] *Title IX Hearings, supra* note 74, at 19; Buek & Orleans, *supra* note 82, at 12.

[84] *See* pp. 1385–86 & note 61 *supra*.

[85] *Congressional Review Hearings, supra* note 4, at 446; Interview with Gwendolyn Gregory, Director, Office of Policy Communications, Office for Civil Rights, HEW, in Washington, D.C. (May 27, 1976) [hereinafter cited as Gregory interview].

[86] Of course, there was precedent for negotiation by this time in the administration of the OE's basic grants program, which did have a veto provision.

[87] *See* 39 Fed. Reg. 22227 (1974). The proposed rule took two years to develop. The agency received over 9,700 comments, 40 Fed. Reg. 24127, 24128 (1975), and attempted to respond to them in the final rule, *Title IX Hearings, supra* note 74, at 31. For example, the proposed rules lacked self-evaluation requirements, but many comments sought them, and the final rule included them. *Id.* at 39.

[88] *Congressional Review Hearings, supra* note 4, at 446; Gregory interview, *supra* note 85.

[89] Gregory interview, *supra* note 85.

After the final rule had been adopted by the agency, several resolutions of disapproval were introduced in Congress.[91] The only one to reach a hearing would have disapproved the very requirements for self-evaluation desired by the women's groups.[92] Its fate is illustrative of the constraints which time limits and interest groups can place upon the veto process. The resolution was referred first to committee and then to a subcommittee, which held six days of hearings focusing mainly on a proposed bill on a different topic.[93] The subcommittee amended the resolution to add another minor element of disapproval and reported it to the full committee, which, under pressure from the women's organizations, referred it to the Equal Opportunities Subcommittee.[94] As the end of the period for disapproval approached, this subcommittee held a one-day hearing and recommended against passage of the resolution.[95] Nothing further happened, and the regulation took effect at the end of the statutory period for disapproval.

C. The Federal Energy Administration

In contrast to HEW's experience under legislative veto provisions, which illustrates successful negotiation and compromise with Congress, the early history of the Federal Energy Administration (FEA) shows the veto's potential for interbranch deadlock. It demonstrates how, in cases of disagreement on basic policy between Congress and the agency, the veto power can cause the frustration of important agency programs or the failure to formulate any programs at all. For the duration of the impasse the agency is impotent, sharing with Congress the political responsibility for failure to resolve important national policy issues.

After the sales embargo by the oil-producing nations in 1973,

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[90] Because many public comments had sought the same provisions, *see* note 87 *supra*, it is difficult to determine whether they were the result of public comment or congressional pressure or both.

[91] These are described in *Ultra Vires Challenges, supra* note 82, at 146 n.64.

[92] *See* H. Con. Res. 330, 94th Cong., 1st Sess., 121 CONG. REC. H6415 (1975); *Title IX Hearings, supra* note 74, at 1.

[93] *Review of Regulations to Implement Title IX of Public Law 92-318 Conducted Pursuant to Sec. 431 of the General Education Provisions Act: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975); *Title IX Hearings, supra* note 74, at 9.

[94] *See* 33 CONG. Q. 1484 (1975).

[95] *See id.* at 1563 (1975). *See generally Title IX Hearings, supra* note 74.

Congress passed the Emergency Petroleum Allocation Act of 1973 (EPAA)[96] to give the President power to allocate and fix the prices of certain petroleum products.[97] The Act also empowered the President to exempt any product from his controls upon specified findings,[98] but subject to legislative veto by either house of Congress until each house had been in session for five days.[99] In the following year, Congress created the FEA as an "independent agency in the Executive Branch"[100] to exercise the President's powers under the EPAA.[101] The statute applied the APA's rulemaking provisions to the FEA, with some modifications.[102]

Although the FEA began to develop proposals for decontrol immediately, no such proposals were implemented for nearly two years because of the inability of the agency and Congress to agree on policy. In July 1974, the new agency published a proposal to decontrol residual fuel oil, a heavy oil used by utilities and industry, especially in the Northeast.[103] But the proposal was dropped after informal consultation between the Administrator and a group of northeastern Congressmen convinced the agency that the proposed exemption would not survive review.[104] The matter then lay dormant while both President Nixon and Administrator Sawhill left office.

In his first state of the Union message, incoming President Ford proposed decontrol of the prices of all regulated petroleum products,[105] but Congress was in no mood to concur. In an effort to reach an accommodation with Congress, the FEA in 1975 prepared three successive proposals for phased decontrol, with time spans of 24, 30, and 39 months.[106] The first was withdrawn when it became clear that Congress would not accept it.[107] The latter two were vetoed by the House,[108] even though the 39-month plan sought political acceptability by providing for small price increases before the 1976 elections, and much steeper increases afterwards. The agency would go no further; it made no more submissions prior to December of 1975, when the enactment of the Energy Policy and Conservation Act of 1975 (EPCA) [109] settled the issue by legislation.

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[96] Pub. L. No. 93–159, Stat. 627 (1973) (codified at 15 U.S.C. §§ 751–760 (Supp. V 1975)), *repealed by* Energy Policy and Conservation Act of 1975, Pub. L. No. 94–163, § 401(b)(1), 89 Stat. 871; *see* pp. 1392–94 *infra*.

[97] *See* 15 U.S.C. § 753(a) (Supp. V 1975) (repealed 1975).

[98] *See* 15 U.S.C. § 753(g)(2) (Supp. V 1975) (repealed 1975).

[99] *See id.*

[100] *See* 15 U.S.C. § 762 (Supp. V 1975).

[101] Federal Energy Administration Act of 1974, Pub. L. No. 93–275, 88 Stat. 97 (codified at 15 U.S.C. §§ 761–798 (Supp. V 1975)).

[102] A minimum of ten days was required for public comment, but this requirement was waivable upon a detailed finding that delay would cause serious harm to the public. For rules with significant impact, the statute required an opportunity for oral presentation of views, to occur no later than 45 days after the rule's issuance. *See* 15 U.S.C. § 766(i)(1) (Supp. V 1975).

[103] 39 Fed. Reg. 24669 (1974).

[104] Interview with David Wilson, Office of General Counsel, Federal Energy Administration, in Washington, D.C. (June 2, 1976) [hereinafter cited as Wilson interview]; Interview with Eric Fygi, Office of General Counsel, Federal Energy Administration, in Washington, D.C. (May 20, 1976).

[105] *See* 11 WEEKLY COMP. PRES. DOCS. 49 (1975).

There were several reasons for the agency's failure to reach a successful compromise with Congress during this period. Most important, it became clear that a Congress beset by fears of inflation was not yet ready for decontrol; in fact, it appeared to the agency that the congressional position hardened as the FEA gave way.[110] Moreover, Congress was in the process of attempting to develop a coherent national energy policy for the first time. Accordingly, the agency's efforts occurred during a period of massive political maneuvers in Congress. It is thus not surprising that the agency was unable to gauge the mood of Congress accurately. Despite the agency's judgment that both of the later 1975 decontrol proposals had sufficient support in Congress to survive review, both were vetoed.[111] These setbacks were also due in part to the ability of congressional staff to provide rapid and independent evaluation of the decontrol proposals. The agency had supported them with analysis based on computer models of the economy but was met with alternative computer analyses developed by the committee staffs during the short review period.[112]

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[106] *See* 40 Fed. Reg. 19219, 30030, 31741 (1975).

[107] Wilson interview, *supra* note 104; Interview with Gorman Smith, Assistant Administrator, Regulatory Programs, Federal Energy Administration, in Washington, D.C. (June 2, 1976) [hereinafter cited as Smith interview].

[108] The first veto is described at 40 Fed. Reg. 31741 (1975). The second is H.R. Res. 641, 94th Cong., 1st Sess., 121 CONG. REC. H7899–900 (daily ed. July 30, 1975); 40 Fed. Reg. 34161 (1975). The Senate briefly debated its own resolution disapproving the proposed decontrols, but it was ultimately tabled. S. Res. 145, 94th Cong., 1st Sess., 121 CONG. REC. S14318 (daily ed. July 30, 1975); 121 CONG. REC. S14473 (daily ed. July 31, 1975).

[109] Pub. L. No. 94–163, 89 Stat. 871 (1975) (codified at 42 U.S.C. §§ 6201–6422 (Supp. V 1975)). One technical decontrol proposal, concerning "stripper wells," did pass under the EPAA. Prices of oil from such wells, which produce less than ten barrels per day, had not been controlled. To create an incentive for greater production, the proposal allowed a well that had obtained stripper status to retain it even if it produced more oil. *See* 40 Fed. Reg. 10195, 22123 (1975). Though the proposal was preceded by consultation with congressional staff from both houses, Smith interview, *supra* note 107, the consultation produced no changes, as the proposal was not controversial. No congressional action was taken.

[110] Smith interview, *supra* note 107; Wilson interview, *supra* note 104.

[111] Smith interview, *supra* note 107; Wilson interview, *supra* note 104.

A revised legislative veto procedure was inaugurated by the EPCA.[113] The procedure applied to certain FEA rules termed "energy actions," among which were exemptions from price and allocation regulations promulgated under the EPAA.[114] The statute extended the period of review to fifteen days of continuous congressional session [115] but provided that energy actions could take effect earlier if approved by resolution in both houses.[116] There were also provisions to expedite disposition of a veto resolution [117] and limitations on judicial review of rules that had survived in Congress.[118]

After the passage of the EPCA, the FEA submitted as Energy Action No. 1 [119] a proposal to decontrol residual fuel oil, for which it had unsuccessfully floated a trial balloon earlier. This time, the FEA was well prepared. It developed extensive data on the east coast market to show that further price control would be counterproductive.[120] Administrator Zarb met with members of Congress to press for approval,[121] and the Action included some specific provisions designed to win favor in the Northeast.[122] As a result of these efforts, the proposal sailed through without controversy.[123]

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[112] Interview with Charles Curtis, Counsel, House Comm. on Interstate and Foreign Commerce, in Washington, D.C. (June 4, 1976) [hereinafter cited as Curtis interview].

[113] Pub. L. No. 94–163, 89 Stat. 871 (codified at 42 U.S.C. § 6421 (Supp. V 1975)).

[114] *See* 15 U.S.C. § 760a(c) (Supp. V 1975). There was a separate provision for review of energy conservation contingency plans and rationing contingency plans, which required the approval of both houses of Congress. 42 U.S.C. § 6221 (Supp. V 1975); 41 Fed. Reg. 21908, 21918 (1976).

[115] *See* 42 U.S.C. § 6421(c)(1) (Supp. V 1975).

[116] *See* 42 U.S.C. § 6421(c)(1), (2) (Supp. V 1975).

[117] *See* 42 U.S.C. § 6421(f)(3), (4) (Supp. V 1975).

[118] These provided that a court reviewing an energy action could not invalidate it on the ground that the findings were not adequate to meet the requirements of the energy statutes, or were arbitrary or without sufficient factual foundation within the meaning of the APA. *See* 15 U.S.C. § 757 (h) (Supp. V 1975) (referring to 5 U.S.C. § 706(2)(A), (E), (F) (1970)).

The EPCA applied APA rulemaking provisions to most rules adopted pursuant to it, with modifications similar to those in the EPAA. *See* 42 U.S.C. § 6393 (Supp. V 1975); p. 1391 & note 102 *supra*.

[119] 41 Fed. Reg. 7122 (1976).

[120] *See id.* at 7124–33.

[121] Interview with William J. Van Ness, Chief Counsel, Senate Comm. on Interior and Insular Affairs, Washington, D.C. (June 2, 1976) [hereinafter cited as Van Ness interview].

[122] Wilson interview, *supra* note 104.

[123] *See* 41 Fed. Reg. 13898 (1976); Smith interview, *supra* note 107; Van Ness interview, *supra* note 121; Wilson interview, *supra* note 104.

In lengthening the period for congressional review from five to fifteen days under the EPCA, Congress had tried to give itself more time to consider energy actions in depth. Still, it had wanted disapproval to come from its members' own reactions to executive action, and not from external pressures.[124] Thus, the review period had purposely been kept short to shelter Congress from a concerted lobbying effort.[125] And since the normal committee report process can seldom be completed in less than fifteen days, the brevity of the review period had the additional effect of reducing the role of committee guidance. It thus made a veto unlikely unless an action was clearly inconsistent with the majority will of a house. The history oi Energy Action No. 2 [126] show how these effects can prove decisive in technical areas of law in which congressional staff cannot match the agency's ability to gather and analyze relevant data.

To achieve competitive equity under its allocation and price controls, Congress created a system of "entitlements," or transfer payments among refiners. In an effort to equalize the costs of oil acquired by refiners, Congress required those refiners who used more than the national average of cheap "old" oil to make payments to those who used more than the national average of the more expensive "new" or imported oil. Through an amendment to the EPCA,[127] certain small refiners secured a partial exemption from these payments, and with it a windfall for those with significant stocks of old oil. Another amendment was added, however, authorizing a rule to remove the entitlement exemption upon a finding that it resulted in an unfair economic or competitive advantage for some small refiners over the others.[128] Energy Action No. 2 was promulgated to implement the second amendment. In order to generate lobbying support from those small refiners who would be deprived of their windfall, the Action contained, in addition to the revocation of exemptions, provisions for doubling the "small refiner bias," a price advantage applicable to all small refiners.[129]

Energy Action No. 2 was a highly technical regulation, and the FEA experienced some difficulty in educating Congress regarding it. In a briefing paper prepared for Congress,[130] the agency was able to demonstrate sharp differences in crude oil costs to small refiners in the absence of entitlements payments, but it could not translate these into differences in prices charged for refined oil.[131] Although congressional staff felt the proposal needed the support of explanatory data on the profitability of small refiners,[132] the subject was not one on which the staff could perform an independent analysis.[133] There had been little advance warning that the proposal was forthcoming,[134] and some staff members believed that the FEA had intentionally surprised Congress with Energy Action No. 2 so that the period for review would run before a careful evaluation could be made.[135]

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[124] Curtis interview, *supra* note 112.

[125] *Id.*

[126] 41 Fed. Reg. 9391, 20392 (1976).

[127] *See* 15 U.S.C. § 753(e) (Supp. V 1975).

[128] *See* 15 U.S.C. § 760a(g) (Supp. V 1975).

[129] Smith interview, *supra* note 107; Wilson interview, *supra* note 104.

[130] Federal Energy Administration, Briefing Paper on the Increase in Small Refiner Bias and Revocation of Current Small Refiner Exemption (May 21, 1976).

Whether or not such surprise was intended, Congress' inability to make a thorough analysis, coupled with the increase in lobbying support generated by the provision for doubling the small refiner bias, led to the Action's survival despite substantial congressional doubt. Resolutions of disapproval were introduced in both houses,[136] and hearings were quickly held.[137] But the time for review dwindled and a motion to discharge the resolution from committee became necessary in the Senate.[138] As a consequence, much of the debate over Energy Action No. 2 was procedural rather than substantive. Some members took the position that, in the absence of committee guidance, they would have to support the President's program.[139] There were complaints about the inadequacy of the FEA's data, and pressure was put on the FEA to withdraw the Action so that Congress would have more time to consider it.[140] The FEA declined to withdraw it, and the veto resolutions failed to pass in either house when the votes were taken on the last day of the review period.[141]

This scenario was repeated in its broad outline when Congress considered Energy Actions Nos. 3 and 4,[142] which proposed decontrol of the middle petroleum distillates, principally heating and diesel oil. The FEA felt that its findings in favor of decontrol were stronger for these products than they had been for residual oil.[143] The agency had doubts, however, that the proposals would survive congressional review, since many voters feel the direct effects of increased prices for the middle distillates.[144] Thus, the anticipated problems of congressional review were primarily political. Veto resolutions were again introduced in both houses, and the Senate committee reported its resolution favorably.[145] Nevertheless, both resolutions again failed in votes taken on the last day for review.[146] The histories of Energy Actions Nos. 2, 3, and 4 illustrate the difficulty of exercising the legislative veto power when the period for review is short. The short review period does not seem to have had its intended effect of sparing Congress from lobbying by the FEA on the one hand and interests opposed to the proposals on the other. In fact, by hampering the normal committee report process, Congress may have deprived itself of sufficient internal guidance on the very sort of technical subject matter for which it usually relies heavily on committee expertise. Thus, the members of Congress may have been left to exercise their independent judgment when they felt least capable of doing so. This may have resulted in an advantage for the contending lobbies, perhaps especially for the "expert" FEA,[147] rather than the intended disadvantage.

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[131] Smith interview, *supra* note 107. The FEA argued that such a calculation would entail immense labor and would be unreliable because of other variables affecting prices.

[132] Van Ness interview, *supra* note 121.

[133] Curtis interview, *supra* note 112.

[134] *Id.*; Van Ness interview, *supra* note 121.

[135] Van Ness interview, *supra* note 121. There was, however, substantial lobbying by interested parties, including the FEA, during the review period. *Id.*; Wilson interview, *supra* note 104.

[136] H.R. Res. 1205, 94th Cong., 2d Sess., 122 CONG. REC. H4633 (daily ed. May 10, 1976); S. Res. 449, 450, 94th Cong., 2d Sess., 122 CONG. REC. S7450 (daily ed. May 19, 1976).

[137] *See* 122 CONG. REC. S8163–64 (daily ed. May 27, 1976); *Hearing on S. Res. 449 and 450 Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. (1976).

[138] *See* 42 U.S.C. § 6421(f)(4) (Supp. V 1975).

[139] *See* 122 CONG. REC. H5029 (daily ed. May 27, 1976) (remarks of Rep. Brown).

[140] *See id.* at H5031 (remarks of Rep. Staggers).

[141] *See id.*

For its part, the FEA did not engage in the detailed negotiation over the substance of proposed rules that typified HEW's practice, perhaps because of the diminished role of the committee process. Instead, the FEA ordinarily tried to defuse political opposition in advance by the substance or timing of its proposals. It then lobbied Congress from a relatively fixed position.[148] This practice seems to reflect a view that Congress would not have the time or the ability to understand and evaluate a proposal fully, so that raw political power would likely carry the day.[149]

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[142] 41 Fed. Reg. 22591 (1976). *See also id.* at 17512, 24516.

[143] Smith interview, *supra* note 107.

[144] *Id.*

[145] H.R. Res. 1302, 1303, 94th Cong., 2d Sess., 122 CONG. REC. H5927 (daily ed. June 15, 1976); S. Res. 469, 470, 94th Cong., 2d Sess., 122 CONG. REC. S9765 (daily ed. June 17, 1976); *Hearing on S. Res. 469 and 470 Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. (1976); S. REP. Nos. 94–1000 & 94–1001, 94th Cong., 2d Sess. (1976).

[146] 122 CONG. REC. H7230 (daily ed. July 1, 1976) (continuing the proceedings of June 30, 1976); 122 CONG. REC. S11202–09, S11247 (daily ed. June 30, 1976).

[147] Some of the congressional staff feel that the agency has such an advantage. Van Ness interview, *supra* note 121.

[148] *Id.*; Curtis interview, *supra* note 112.

D. The General Services Administration and the Disposition of President Nixon's Papers and Tapes

A legislative veto provision gives Congress the power to disapprove an agency's rules, not to rewrite them. Within the confines of the veto procedure, Congress can only respond to the agency's initiatives. Thus, irreconcilable disagreement between the agency and Congress can result in a deadlock of considerable duration. Moreover, the danger of deadlock is increased when the agency in question is one within the executive branch and the two branches have opposing political objectives with regard to the agency's program. Such was the case in the efforts of the General Services Administration (GSA) to provide by rule for the disposition of President Nixon's controversial papers and tape recordings.

In September 1974, a month after his resignation from the Presidency, Mr. Nixon made an agreement with General Services Administrator Sampson granting the government custody of the papers and tapes but recognizing title in Mr. Nixon.[150] The agreement provided that the tape recordings were to be destroyed upon Mr. Nixon's death or in 1984, whichever occurred first. Objecting to this agreement because it placed the materials in imminent danger of destruction and overly restricted access of the courts and public to them,[151] Congress speedily passed the

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[149] The FEA's later adventures in the 94th Congress deserve brief summary. On July 30, 1976, the Federal Energy Administration Act expired. Act of June 30, 1976, Pub. L. No. 94-332, 90 Stat. 784. After a hiatus during which its functions were performed by a federal energy office created by executive order, Exec. Order No. 11,930, 41 Fed. Reg. 32399 (1976), *revoked by* Exec. Order No. 11,933, 41 Fed. Reg. 36641 (1976), the FEA was reconstituted by the Energy Conservation and Production Act of 1976. Act of August 14, 1976, Pub. L. No. 94-385, 90 Stat. 1125 (codified in scattered sections of 15, 42 U.S.C.). The FEA's decontrol program then continued with the exemption of naphtha jet fuel from price controls in Energy Actions Nos. 6 and 7, which did not arouse substantial congressional displeasure. 41 Fed. Reg. 40451; 122 CONG. REC. S16078 (Sept. 17, 1976). Energy Action No. 5, the exemption of specialty products such as lubricants, had previously passed without controversy. 41 Fed. Reg. 34785 (1976). The final major step, the decontrol of gasoline, was left for after the 1976 elections. *See* 41 Fed. Reg. 51832 (1976) (notice of proposed rulemaking).

[150] The Nixon-Sampson agreement, 120 CONG. REC. S18326 (daily ed. Oct. 4, 1974), resolved the legal issues in accordance with Attorney General Saxbe's opinion of the day before, 43 OP. ATT'Y GEN. 1 (1974).

[151] S. REP. No. 93-1181, 93d Cong., 2d Sess. 4 (1974); H.R. REP. No. 93-1507, 93d Cong., 2d Sess. 3 (1974). *See generally* Nixon v. Richey, 513 F.2d 430, 439 n.81 (D.C. Cir. 1975).

Presidential Recordings and Materials Preservation Act to protect and control them.[152]

Title I of the Act directed the Administrator of General Services to take possession of Mr. Nixon's presidential papers and tape recordings and to submit a report to Congress within ninety days, proposing and explaining regulations to provide public access to them. These regulations, which could be disapproved by a resolution of either house within ninety legislative days, were to meet a series of explicit purposes: to provide the public with the full truth about the Watergate scandal at "the earliest reasonable date," to make the materials available to the courts for fair trials, to provide public access to materials of general historical interest unrelated to Watergate, to protect privileged material and information affecting national security, and to return personal materials to Mr. Nixon. Despite this explicit enumeration of statutory objectives, and despite repeated and intensive negotiations with committees of both houses, GSA has not yet promulgated a set of regulations that has survived congressional review. GSA has issued three sets of proposed rules; Congress has vetoed all three.

While formulating the first set of rules, GSA consulted closely with the staffs of a Senate committee and a House subcommittee.[153] In a series of twelve to fifteen meetings with the Senate staff, GSA presented drafts of the regulations for comment and criticism and then revised the drafts for presentation at the next meeting.[154] Significant changes were also made on the early drafts after long line-by-line sessions with House staff.[155] These negotiations reduced the number of unresolved issues to five or six by the time the regulations formally reached Congress.[156] There was no public participation in the rulemaking because the statute did not require it.[157] And GSA would not have entered negotiations with the committees in the absence of a veto provision.[158] Thus, as with HEW, the existence of a legislative veto gave rise to close consultation between the agency and Congress to determine the substance of regulations.

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[152] Act of Dec. 19, 1974, Pub. L. No. 93-526, 88 Stat. 1695, *reprinted at* 44 U.S.C. § 2107 note (Supp. V 1975). The legislative history includes S. REP. No. 93-1181, 93d Cong., 2d Sess. (1974); S. REP. No. 93-1182, 93d Cong., 2d Sess. (1974); *Hearings on the "Public Documents Act" Before the Subcomm. on Printing of the House Administration Comm.*, 93d Cong., 2d Sess. (1974). After consideration by a conference committee, both Houses enacted the legislation on December 9, 1974. 120 CONG. REC. H11445, S20809 (daily ed. Dec. 9, 1974). For a chronology of the legislative history, see Nixon v. Richey, 513 F.2d 430, 440 (D.C. Cir. 1975).

[153] Interview with Donald P. Young, General Counsel, GSA, and Steven Garfinkel, Chief Counsel, Records and Archives, GSA, in Washington, D.C. (May 27, 1976) [hereinafter cited as Young-Garfinkel interview].

[154] Interview with Eli E. Nobleman, Counsel, Senate Comm. on Gov't Operations, in Washington, D.C. (June 2, 1976) [hereinafter cited as Nobleman interview].

[155] Interview with Edward J. Davey, Jr., Counsel, Subcomm. on Printing, House Administration Comm., in Washington, D.C. (June 1, 1976) [hereinafter cited as Davey interview]; Interview with William E. Sudow, Former Special Assistant to Rep. Brademas, Office of the Majority Whip, and Counsel, Subcomm. on Printing, House Administration Comm., in Washington, D.C. (June 2, 1976) [hereinafter cited as Sudow interview].

The first set of proposed regulations appeared on March 19, 1975, the last day permitted by the statute.[159] In the Senate hearings that followed, the function of congressional review was said to be to determine whether the rules conformed to their statutory purpose.[160] The agency argued for restrictions on public access to avoid deterring future Presidents from keeping records.[161] It further argued that the critical decisions on public disclosure should be made by the Administrator, a political appointee, and that the statutory responsibility to make such decisions could not legally be delegated to anyone else.[162] Memoranda on these and other legal issues were exchanged by a Senator, the Administrator, and interested scholars.[163]

In the end, the Senate committee decided that the regulations were inconsistent with the purposes of the statute in eleven particulars and recommended passage of a veto resolution.[164] For each of the eleven offending provisions, the committee report suggested substitute language to guide later GSA submissions. The committee did not assert, however, congressional power to amend GSA's rules without legislation.[165] It did assert the power to veto particular items in a rule, leaving the rest to take effect, but recommended complete disapproval here because the provisions in question were integral to the regulations.

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[156] Sudow interview, *supra* note 155.

[157] Young-Garfinkel interview, *supra* note 153. In addition, the general question of public access to presidential materials was to be examined by a commission created by title II of the statute, Public Documents Act §§ 201–203, 44 U.S.C. §§ 3315–3324 (Supp. V 1975).

[158] Young-Garfinkel interview, *supra* note 153.

[159] 40 Fed. Reg. 2670–71 (1975).

[160] *Hearings on the GSA Regulations Implementing the Presidential Records and Materials Preservation Act Before the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. 1 (1975) [hereinafter cited as *1975 Hearings Before the Senate Comm. on Gov't Operations*].

[161] *Id.* at 7–8, 23–24.

[162] *Id.* at 24–25, 76, 344–48, 371–78.

[163] *Id.* at 70–72.

[164] S. REP. No. 94-368, 94th Cong., 1st Sess. 1 (1975).

[165] *1975 Hearings Before the Senate Comm. on Gov't Operations*, *supra* note 160, at 70–72.

While a similar veto resolution was being considered in a House subcommittee,[166] the Senate vetoed the first set of proposed rules, primarily because they allowed the Administrator to override archivists' decisions on public access to the materials.[167] GSA thereupon revised its rules; a second set of proposed regulations was submitted to Congress on October 15, 1975, Administrator Sampson's last day in office. Under the revised rules, the Administrator was to be only one member of an access review board, the decision of which was to be final. Though Senate committee staff initially objected to the Administrator's presence on the board, after negotiations they acceded to GSA's position.[168] Because the House staff would also have preferred removal of the Administrator from the board, however, his role remained open for negotiation.[169] This episode suggests the potential for delay inherent in tripartite negotiation between an agency and the two houses of Congress.

In the case of the GSA regulations, however, the major obstacle to successful compromise was not the structure of the negotiations, but the political division between GSA and Congress. As an agency within the executive branch, GSA was responsible to a Republican President, while a Democratic majority controlled Congress. Because of the presence of Administrator Sampson, whose agreement with former President Nixon had prompted the legislation, Congress had been suspicious of GSA throughout the rulemaking proceedings. This suspicion grew to formidable proportions when GSA, ostensibly responding to doubts cast by a judicial decision upholding the constitutionality of the Act, tried to withdraw the second set of regulations before hearings in the House could begin.

The decision in question was *Nixon v. Administrator of General Services*,[170] in which a three-judge court rejected a claim that the Act was unconstitutional on its face and refused to enjoin its enforcement. While the proposed regulations were not in issue, the court discussed in dictum some constitutional constraints on them. First, the court noted that the regulations should preserve the fundamental rights to privacy of Mr. Nixon and others, stating, however, that the proposed rules would provide "not insignificant" protection in this regard.[171] Second, it suggested that the provisions for referral of evidence of crime found in the presidential materials would warrant reexamination in light of the fourth amendment.[172] Although the court did not enjoin enforcement of the Act as a whole, it did enjoin GSA from processing or disposing of the materials pending appeal.

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[166] *Hearings on GSA Regulations to Implement Title I of the Presidential Recordings and Materials Preservation Act Before the Subcomm. on Printing of the House Comm. on Administration*, 94th Cong., 1st Sess. (1975). These hearings characterized review as directed to the legality of the rules. *Id.* at 29.

[167] 121 CONG. REC. S15803–08 (daily ed. Sept. 11, 1975); Nobleman interview, *supra* note 154; Sudow interview, *supra* note 155. The House committee shared the Senate's concern over the role of the Administrator in public access decisions, H.R. REP. No. 94–560, 94th Cong., 1st Sess. 4 (1975), and over GSA's ban on reproduction of tapes (which was meant to avoid commercial exploitation). The House Committee also had an interest not fully shared in the Senate regarding the adequacy of notice to be given to persons mentioned in the tapes before public access occurred. H.R. REP. No. 94–560, 95th Cong., 1st Sess. 8–9 (1975); Davey interview, *supra* note 155; Sudow interview, *supra* note 155.

[168] Nobleman interview, *supra* note 154.

[169] Davey interview, *supra* note 155.

[170] 408 F. Supp. 321 (D.D.C. 1976) (three-judge court), *prob. juris. noted*, 45 U.S.L.W. 3399 (U.S. Nov. 29, 1976) (No. 75–1605). The decision did not reach

Reading the decision as throwing substantial constitutional doubt on its proposed regulations, GSA concluded that it should review them carefully.[173] Just prior to the scheduled House hearings, Administrator Eckerd attempted to withdraw the proposed rules from further congressional consideration.[174] The congressional reaction was one of anger. This was partly due to the staff's great investment of time in negotiations, which would be wasted if the rules were changed significantly.[175] It was also due to the suspicion and mistrust of the agency's motives that had existed from the outset. There was some feeling among the Senate staff that GSA's chief objective was to delay implementation of the statute to avoid disclosure of the details of the Watergate scandal until after the 1976 presidential election.[176] To the staff of both houses, the withdrawal attempt seemed unjustified and in bad faith.[177] The committees refused to recognize the withdrawal as valid because the statute made no provision for it and because delay would frustrate the statutory aim of providing the public with the truth about Watergate as quickly as possible.[178] The ensuing House hearings were bitter.[179]

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the issue of the constitutionality of the legislative veto provision. *See* 408 F. Supp. at 338 n.17.

[171] *Id.* at 335–37, 357–58 & n.52, 368 n.65.

[172] *Id.* at 366 & n.61.

[173] Young-Garfinkel interview, *supra* note 153. GSA had responsibility for assisting the Department of Justice in defending Mr. Nixon's lawsuit and was encouraged to reconsider its rules by the Department. *Id.*

[174] Letter from Jack Eckerd to Nelson Rockefeller (Jan. 21, 1976), *printed in* S. REP. No. 94–748, 94th Cong., 2d Sess. 3 (1976).

[175] Nobleman interview, *supra* note 154; Sudow interview, *supra* note 155.

[176] Nobleman interview, *supra* note 154.

[177] *Id.*; Sudow interview, *supra* note 155.

[178] Letter from Abraham Ribicoff, John Brademas, and Charles Percy to Jack Eckerd (Feb. 5, 1976), *printed in* S. REP. No. 94–748, 94th Cong., 2d Sess. 4–5 (1976). The withdrawal could produce actual delay in access, of course, only after removal of the court orders preventing GSA from processing the materials.

[179] Sudow interview, *supra* note 155.

In its report on the second set of proposed regulations, the Senate committee argued that the withdrawal was not effective and that the regulations would take effect unless disapproved.[180] The committee report said that the second set of regulations had resolved most of the problems found in the first set.[181] Nevertheless, the committee and GSA had failed to resolve problems involving the composition of the review board, the adequacy of notice to affected individuals prior to public access, the ban on reproduction of tapes, and certain other provisions.[182] As a result, the committee recommended passage of the veto resolution. On April 8, 1976, the Senate vetoed the second set of proposed regulations in seven particulars.[183]

Following this veto, GSA submitted what it regarded as a new, third set of proposed rules. Although the agency had made some concessions on principal issues, these were well short of surrender. Two meetings prior to submission of the rules between the Administrator and Representative Brademas and his staff had produced no changes.[184] On September 14, the House vetoed the third set of rules in six of the seven particulars which the Senate had vetoed in April.[185] After this third veto of its public access regulations, GSA awaited the convening of the Ninety-Fifth Congress for further submissions.

There are several important lessons to be learned from this brief history. First, despite numerous and intense negotiations, a legislative veto may only lead to deadlock and inaction where there are substantial political differences between Congress and the rulemaking agency. In such a case, the delegation of power to the agency becomes an excuse for inaction in Congress, probably making it more difficult for Congress to pass further legislation implementing its views. Thus a recalcitrant agency, by refusing to modify its rules to accord with the desire of Congress, or by refusing to submit new rules after a veto, may bring the process of government to a halt and render the initial delegation ineffectual.

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[180] S. Rep. No. 94–748, 94th Cong., 2d Sess. 2 (1976).

[181] *Id.*

[182] *Id.* at 5.

[183] S. Res. 428, 94th Cong., 2d Sess., 122 Cong. Rec. S5290–91 (daily ed. April 8, 1976).

[184] Davey interview, *supra* note 155; Sudow interview, *supra* note 155; Young-Garfinkel interview, *supra* note 153.

[185] H.R. Res. 1505, 122 Cong. Rec. H10043–44 (Sept. 14, 1976). The report of the Committee on House Administration took the position that except for the vetoed items, GSA's rules had already taken effect. H. R. Rep. No. 94–1485, 94th Cong., 2d Sess. (1976). Since the rules could not be implemented without the vetoed provisions and since court orders had stayed implementation, the issue of the legality of their "withdrawal" became largely academic. In other circumstances, however, the attempt to use an "item veto" could leave the legal status of rules in the greatest doubt.

Second, judicial and legislative review of regulations may interact in complex ways. In *Nixon v. Administrator of General Services*, the court remarked on the Administrator's "dilemma" should Congress veto rules he thought necessary to provide adequate constitutional protection.[186] This dilemma suggests the possibility that the courts, in applying the strictures of the Constitution, will create a deadlock which the agency is powerless to break. Similar specters of impasse and legal confusion are raised by the controversy over the effectiveness of GSA's attempt to withdraw its rules from congressional consideration.[187]

Third, GSA's experience with Congress suggests the potential for mischief in the use of an item veto, which could nullify parts of a regulation, leaving the rest to take effect. Functionally, such a result is difficult to distinguish from the disclaimed power to rewrite agency rules without legislation. Further, it could have the practical disadvantage of leaving rules to be administered by an agency not in sympathy with their altered substance.[188] More important, the assertion of item veto power has a constitutional dimension. In most applications an item veto is a lesser intrusion into the administrative function than affirmative congressional amendment of rules without legislation. At the same time, the item veto may represent a more substantial intrusion into the administrative function than does the entire veto of a rule, because it interferes with the particular resolution of policy made by the agency.[189] Thus, if the legislative veto of an entire rule is seen as the limit of congressional power to act without legislation, the item veto may be unconstitutional.

E. The Federal Election Commission and Reform of Campaign Expenditures

Interbranch political differences are not the only source of delay and deadlock in the application of a legislative veto. The same sort of impasse may occur when the agency is independent, especially when the agency's mandate is to perform a politically sensitive function.[190] An agency's formal independence from presidential control may, however, signal an increased dependence on Congress, and a lessened ability to resist congressional demands.[191] Especially when the function of the agency is to regulate conduct of the members of Congress themselves, the legislative veto may be a means of keeping the real power in the hands of Congress while creating the appearance of independent authority in the agency's hands. Congress may use the veto to determine the content of agency policy — or to frustrate statutory purposes entirely — while the political responsibility is lodged formally with the agency. Indeed, this seems to have been Congress' course of action with regard to the Federal Election Commission (FEC) and the establishment of rules for expenditures in presidential and congressional campaigns.

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[186] 408 F. Supp. at 338 n.17.

[187] This issue, however, could easily be settled by explicit statutory provisions permitting or prohibiting withdrawal.

[188] To a certain extent, the same disadvantage exists when a court invalidates sections of a rule on statutory or constitutional grounds. But an agency displeased with judicial nullification of part of a rule may rescind the rule entirely, if it prefers that option. Such a choice will not be freely available to an agency whose rule is subject to an item veto by Congress, whenever any further amendment (including rescission) is also subject to a veto.

[189] Although the veto of an entire rule may seem a greater use of congressional power, it leaves the agency free to recast the rule as it chooses.

In response to the misuses of campaign contributions during the Watergate era, Congress established the FEC in 1974 to supervise and regulate the acquisition and use of campaign funds by candidates for federal office.[192] The agency was to proceed by requiring reports, investigating, bringing enforcement actions, and making rules pursuant to APA procedures.[193] Both presidential and congressional candidates were within the FEC's jurisdiction. Because of the breadth of its jurisdiction and the political sensitivity of its mission, the agency's authority was carefully circumscribed by checks and balances. Originally, it was to have been composed of two presidential appointees, two House appointees, and two Senate appointees, all to be confirmed by a majority of both houses. This composition was struck down in *Buckley v. Valeo*[194] as violative of the appointments clause of the Constitution.[195] The greatest surviving check on the Commission's power was a legislative veto provision. Proposed rules were to be transmitted to Congress with detailed explanation and justification and could be disapproved at any time within thirty legislative days.[196] Rules dealing with congressional campaigns could be disapproved only by the house affected, while those dealing with presidential campaigns could be disapproved by either house.

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[190] Of course, neither independent agencies nor those within the executive branch are divorced from politics. Theoretically, they differ in the greater freedom of the independent agencies from presidential control, but the practical differences in this regard can easily be overstated. *See* Robinson, *supra* note 1, at 950–52.

[191] *See id.* at 954–55.

[192] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.). The FEC is established under 2 U.S.C. § 437c(a) (Supp. V 1975).

[193] For the rulemaking procedures, see 2 U.S.C. § 437d(a)(3) (Supp. V 1975).

[194] 424 U.S. 1 (1976).

[195] U.S. CONST. art. II, § 2, cl. 2. *See* 424 U.S. at 140–41; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 172 n.9 (1976).

Although the inclusion of the legislative veto provisions was motivated partly by generalized distrust of the agencies and partly by a desire to insure the conformity of regulations to the statute, those responsible for them also expressed concern about possible control of Congress by the FEC.[197] In fact, under the veto provision, the control which some Congressmen had feared did not materialize. Even though the FEC, by the time of the *Buckley* decision, had produced a complete set of rules to implement the statute except for the criminal code provisions,[198] Congress demonstrated its ability to prevent proposed rules of which it disapproved from becoming effective. For instance, the FEC proposed that reports of contributions and expenditures be filed initially with it, with copies to be forwarded later to the Secretary of the Senate and the Clerk of the House.[199] Members of the House preferred that the reports be filed with Congress first, so that they could be reviewed for errors and illegalities and corrected by their authors.[200] After meetings between the FEC and House members and staff failed to resolve the issue,[201] the House vetoed the proposed rule on the ground that it conflicted with the statute.[202] Although the FEC had felt that the statute provided clear authority for its rule,[203] it soon capitulated; a revised rule requiring initial filing with Congress was submitted in December 1975 [204] and survived review.

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[196] *See* 2 U.S.C. § 438(c)(2)–(3) (Supp. V 1975). The term legislative day was defined as any day when both houses are in session. There were similar congressional review provisions in the Presidential Election Campaign Fund Act. *See* 26 U.S.C. §§ 9009, 9039 (Supp. V 1975).

[197] Sudow interview, *supra* note 155.

[198] Interview with Dan Swillinger, Assistant General Counsel, Federal Election Commission, and Barry Shillitoe, Senior Staff Attorney, Office of the General Counsel, Federal Election Commission, in Washington, D.C. (May 28, 1976) [hereinafter cited as Swillinger-Shillitoe interview]. The Commission had extended the time for public comment on its proposed rules. 40 Fed. Reg. 28579 (1975); 121 CONG. REC. S11888 (daily ed. July 7, 1975).

[199] 40 Fed. Reg. 33169 (1975); 121 CONG. REC. H8185, S14944 (daily ed. Aug. 1, 1975).

[200] Interview with James F. Schoener, Minority Counsel, Subcomm. on Privileges and Elections, Senate Comm. on Rules and Administration, in Washington, D.C. (June 4, 1976); Sudow interview, *supra* note 155. For criticism of the rule in the House, see 121 CONG. REC. H10196 (daily ed. Oct. 22, 1975) (remarks of Rep. Hays); *id.* at H10188 (remarks of Rep. Brademas).

[201] *See* Clark v. Valeo, No. 76–1227, slip op. at 9 (D.D.C. Sept. 3, 1976) ("Stipulation as to Findings of Fact"), *certification of questions dismissed*, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977) (en banc), *aff'd mem. sub nom.* Clark v. Kimmitt, 45 U.S.L.W. 3789 (U.S. June 6, 1977).

[202] H.R. Res. 780, 94th Cong., 1st Sess., 121 CONG. REC. H10197–98 (daily ed. Oct. 22, 1975). The Act provided that reports and statements "shall be received by" the Clerk of the House and the Secretary of the Senate "as custodian for the

The other salient example of Congress' use of the veto power to protect its own political interests was its treatment of the rule concerning office accounts. As originally proposed by the agency, this rule provided that contributions received by an incumbent federal officeholder to defray the costs of office would be considered subject to the statutory limitations on contributions and expenditures.[205] The Senate committee which considered the rule claimed to support its evident objective — that expenditures which could influence elections but which might not be classifiable as ordinary campaign spending be identified and limited.[206] Nevertheless, its report criticized the rule for treating incumbent governors and other state officials, who were not subject to the statute, differently from incumbent Senators. The committee also criticized the proposed rule for limiting campaign expenditures too drastically.

In response to these criticisms, the FEC transmitted a revised regulation on office accounts.[207] Under this rule, expenditures during the last two years of an incumbent Senator's term and the last year of an incumbent Representative's term were rebuttably presumed to be campaign-related, while a reverse presumption applied to earlier spending. The committee, however, did not think that these provisions removed the inequity between state and federal incumbents. Moreover, since the statute did not explicitly authorize limits on office funds, the committee felt that the FEC "may have exceeded" its statutory authority.[208] Thus, while claiming that a rule drafted to treat every officeholder equally would be acceptable, the committee recommended rejection of the proposed rule, and the Senate complied.[209]

Commission." 2 U.S.C. § 438(d) (Supp. V 1975). *See generally* 121 Cong. Rec. H10188 (daily ed. Oct. 22, 1975) (remarks of Rep. Brademas).

[203] Swillinger-Shillitoe interview, *supra* note 198. The justification for the rule which was transmitted to Congress cited 2 U.S.C. § 437d(a) (Supp. V 1975), which authorized the Commission to order reports to be made by any person.

[204] H.R. Doc. No. 94-314, 94th Cong., 1st Sess. 1 (1975).

[205] 40 Fed. Reg. 32951 (1975); 121 Cong. Rec. S14944 (daily ed. Aug. 1, 1975); 121 Cong. Rec. H8046 (daily ed. July 31, 1975).

[206] S. Rep. No. 94-409, 94th Cong., 1st Sess. 2 (1975).

[207] *Id.* The FEC explained that the changes were based upon testimony (including that of a Senator) at hearings which it had held after transmitting the proposed rule pursuant to congressional request. *Id.* at 11-12.

[208] *Id.* at 3. Although § 439(a) of the Act requires that money received to help defray activities of a federal officeholder must be disclosed, it is silent on limits.

[209] S. Res. 275, 94th Cong., 1st Sess. (1975).

Not content with a veto of the regulations, the committee expressed reluctance to reject a considered proposal without furnishing some guidelines for redrafting. Its report included recommendations, cast in language suitable for embodiment in a rule, for provisions to "equalize" the impact of the rules.[210] In this way, the committee hoped to use the legislative veto to amend agency rules indirectly without legislation. Another Senate committee had employed the same tactic in attempting to modify the GSA's public access rules, with only limited success.[211]

After the veto, the FEC submitted a revised version of the regulation,[212] explaining that it reflected the Senate report, the Senate debate,[213] and subsequent public comments. The rule conformed to the Senate's wishes in extending coverage to all federal officeholders [214] and to state officeholders on their becoming candidates for federal office. But it retained limits on expenditures from a federal incumbent's office account in the last year of a term, thus testing the Senate's willingness to allow any limits at all.[215] To support its interpretation of the statute as including funds contributed to an office account within the definition of political contributions subject to limitation, the agency cited the tax treatment of those funds as contributions and the legislative history of the tax statutes involved. To support its judgments on policy, particularly that concerning the one-year accounting period for federal incumbents, the FEC relied on its public proceedings, including the testimony of two Senators.

The issue was temporarily rendered moot when the *Buckley* decision eviscerated the statute. Congress responded with statutory amendments to reconstitute the Commission,[216] and the agency proposed a new set of regulations.[217] Sobered by its previous experience, it engaged in extensive public procedures before issuing final regulations and submitting them to Congress. Among these procedures were wide informal dissemination of the proposed rules, informational hearings in various regions of the nation, and four days of formal public hearings producing a 400-page transcript.[218] In addition, members of the FEC staff met with staff of the House and Senate committees concerned with the rules, and adopted some of the changes suggested by the congressional staff.[219]

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[210] S. REP. No. 94-109, 94th Cong., 1st Sess. 3-4 (1975).

[211] *See* p. 1399 *supra*.

[212] H.R. Doc. No. 94-313, 94th Cong., 1st Sess. 1, 4 (1975).

[213] 121 CONG. REC. S17873 (daily ed. Oct. 8, 1975).

[214] The President and Vice President, Senators, Representatives, and Delegates and Resident Commissioners to Congress were embraced by this term. H.R. Doc. No. 94-313, 94th Cong., 1st Sess. 2 (1975).

[215] The Senate committee report had been ambiguous on the point. *See* S. REP. No. 94-409, 94th Cong., 1st Sess. 3 (1975).

[216] Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 475 (to be codified in scattered sections in 2, 26 U.S.C.). The amendments contained provisions to expedite disposition of veto resolutions. *Id.* § 110(b)(1) (amending 2 U.S.C. § 438(c)(2) (Supp. V 1975)). They also attempted to resolve the issue of item vetoes by defining the term "rule" as "a provision or series of interrelated provisions stating a single separable rule of law." *Id.* § 110(b)(2) (*amending* 2 U.S.C. § 438(c) (Supp. V 1975)). The conference report explained that the provision was not meant to give Congress the power to rewrite proposed regulations "by disapproving a particular word, phrase, or sentence," but only to give each house the power to determine which provisions were distinct enough to be disapproved. H.R. REP. No. 94-1057, 94th Cong., 2d Sess. 51-52 (1976). In

Despite the FEC's careful preparation, or perhaps because of it, the proposed regulations were again negated by Congress. This time, however, there was no open vote on a veto resolution in one of the houses of Congress, but a legislative version of the "pocket veto." [220] When the Ninety-Fourth Congress adjourned *sine die* on October 1, 1976, the FEC's rules had lain before it for only twenty-eight of the required thirty legislative days. Congress had rejected requests by the Commission that it remain in session for two more days so that the rules could take effect before the 1976 elections;[221] thus the rules were left in limbo. The Commission issued a statement, however, warning that it would treat the lapsed rules as interpretive rules for enforcement purposes and would expect compliance with them during the 1976 elections.[222]

Two lessons can be learned from this history of frustration in statutory implementation.[223] First, Congress can employ all

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conference, Chairman Hays of the Committee on House Administration had complained that the agency was trying to combine a series of unrelated matters, so that Congress would have to accept all or nothing. Conference Transcript, April 8, 1976, at 87–89. The amendment does not speak, however, to the practice of explicit suggestions for agency amendments to rules which would make these rules acceptable to Congress.

[217] 41 Fed. Reg. 21571, 21591 (1976). These included a further revision of the office accounts rule in minor particulars.

[218] *See* Clark v. Valeo, No. 76–1227, slip op. at 11–18 (D.D.C. Sept. 3, 1976) ("Stipulation as to Findings of Fact"), *certification of questions dismissed*, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977) (en banc), *aff'd mem. sub nom.* Clark v. Kimmitt, 45 U.S.L.W. 3789 (U.S. June 6, 1977).

[219] Clark v. Valeo, slip op. at 15–17. One of the requested changes accepted by the FEC concerned a change in filing practices for office account receipts.

[220] *See* Clark v. Valeo, No. 76–1227, slip op. at 2 n.2 (D.C. Cir. Jan. 21, 1977) (MacKinnon, J., dissenting), *digested at* 45 U.S.L.W. 2349 (1977), *aff'd mem. sub nom.* Clark v. Kimmitt, 45 U.S.L.W. 3789 (U.S. June 6, 1977).

[221] Washington Post, Oct. 2, 1976, § A, at 1, col. 1; Letter from FEC Chairman Thomson and Vice Chairman Harris to Speaker of the House Albert (Sept. 29, 1976).

[222] Statement of the Federal Election Commission (Oct. 5, 1976).

[223] Because of the intervention of the *Buckley* decision, Congress and the FEC are not solely chargeable with the delays in implementing the 1974 statute.

the provisions of a legislative veto, including the time limit for its exercise, to influence or delay the implementation of a statute. And in doing so, Congress may be able to avoid taking the political responsibility for its actions. Once an "independent" agency is created, it is the natural focus for public criticism. To the extent that committee suggestions on the content of acceptable rules or legislative vetoes of proposed rules receive less publicity than the passage of the implementing statute, Congress can hide behind the structure it has created. In the case of the "pocket veto," Congress can achieve its political objectives merely by inaction, as it did in evading a vote on the FEC's final office accounts rule.

The second lesson is that public comment at the agency level, even combined with the pressures of interest groups on Congress, may not be sufficient to overcome congressional self-interest. In presenting its first office accounts rule to Congress before the *Buckley* decision, the FEC had been confident that pressure on Congress would force acceptance of the rule.[224] This confidence was misplaced, since sufficient pressure did not materialize. The FEC's later attempt to build a strong record of public comment for its post-*Buckley* set of rules was unavailing because Congress found a way to work its will indirectly. This history thus demonstrates that, where procedures of low public visibility operate parallel to procedures for open public participation, the former can be used to subvert the latter.

III. An Appraisal of the Experience to Date

A. The Negotiation Process

Although the administrative programs in the case histories were quite different, they had certain common characteristics. Each was in an area of considerable public concern, if not controversy. In all the programs except that administered by the GSA, there was repeated major legislation during the period under study. Congress could have used such legislation to resolve issues that had emerged in rulemaking programs subject to legislative vetoes.[225] Whether for reasons of indecision or deadlock,

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But still further delays impended as this history closed. Although the Commission planned to resubmit its rules after the convening of the 95th Congress, it concluded that it could not count the 28 legislative days already passed for purposes of the resubmission. Letter from Daniel J. Swillinger, Asst. General Counsel, FEC, to H. Bruff (Nov. 8, 1976).

[224] Swillinger-Shillitoe interview, *supra* note 198.

[225] Congress availed itself of this opportunity in one major instance in the case studies. The first energy statute, the EPAA, did not provide guidance on the important issue of the timing of decontrol, *see* 15 U.S.C. § 753 (Supp. III

however, it ordinarily chose to leave these issues open in the revised statutes [226] and to rely on the legislative veto mechanism to maintain control over agency policy initiatives. Therefore, the process of review was an active one, not one marked by congressional inattention to forthcoming rules.

Given such conditions, it is not surprising that the veto power gave rise to negotiation and compromise over the substance of rules between the agencies and the congressional oversight committees. Significant negotiation occurred in all five programs despite their disparate natures, and it was often intense.[227] Since the statutes generally created new programs requiring broad implementing regulations, the initial focus of the negotiations was correspondingly broad. As the negotiations progressed, however, the issues in controversy were reduced to a small number for ultimate consideration by Congress. This narrowing process gave the committees and especially their staff substantial power to define the issues that would be likely to receive the attention of Congress as a whole.

Since the agencies demonstrated varying abilities to resist congressional demands for changes in the substance of rules, it cannot be said that the committee staffs dictated changes to the agencies. On two occassions, committees did try to amend agency rules indirectly through the suggestion of acceptable language in their reports.[228] The agencies did not accept these suggestions entirely, however, even at the cost of repeated vetoes.[229] Although Congress sometimes reserved the right to make item vetoes,[230] it did not attempt to use them to delete words or clauses from a regulation and leave it in effect despite agency objections.[231] When

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1973), and vetoes resulted. The EPCA of 1975 provided a schedule. 15 U.S.C. § 757 (Supp. V 1975).

[226] For example, HEW's broad title IX delegation was not clarified by the amendments adding legislative veto authority. *See* p. 1389 *supra*.

[227] The FEA seems to have had the least negotiation; the reduced role of the committee in the review of its rules, due partly to the short review period, led it to lobby Congress directly. For the most intense negotiations, see pp. 1383–84, 1386 *supra* (OE); pp. 1398–99 *supra* (GSA). *See also* p. 1389 *supra* (title IX); pp. 1391, 1393 & note 109 *supra* (FEA); p. 1408 *supra* (FEC).

[228] *See* p. 1399 *supra* (GSA); pp. 1406–07 *supra* (FEC).

[229] GSA suffered more vetoes after refusing to accede to congressional demands. *See* p. 1402 *supra*. The FEC suffered the "pocket veto" that occurred at the adjournment of the 94th Congress. *See* pp. 1407–08 *supra*.

[230] *See* p. 1399 *supra*.

[231] The closest example of such an attempt was Congress' item vetoes of GSA's public access regulations, but these would have prevented implementation of the program were it not already stayed by judicial order. *See* pp. 1399, 1401–02 & note 185 *supra*.

there was really basic disagreement between Congress and the agency, the result was impasse.

Still, the negotiation process between the committees and the agencies always resulted in some compromise, if not agreement. One reason for compromise may have been doubts concerning the constitutionality of veto provisions, which deterred Congress from issuing ultimatums to the agencies.[232] The major determinant of the substantive effect of the veto provisions, however, seems to have been the amount of bargaining power the particular agency had with Congress. The fact that the strength of federal agencies vis-à-vis Congress varies suggests that a general veto provision might have a greater substantive impact on some agencies than on others and that this impact might depend partly on factors extrinsic to the veto process. In the case studies, the GSA showed the greatest resistance to congressional pressure because its position on public access to the Nixon presidential materials was more conservative than that of Congress, so that it did not have a strong desire to obtain acceptance of congressionally modified access rules. And GSA was buttressed on some of the issues by pressure from the courts to protect privacy interests.[233] In a middle range of bargaining power were the FEA and HEW: the FEA had the advantages of expertise on technical rules, a reduced committee role, and a short review period, while HEW could rely on popular pressure to keep its grant programs functioning to moderate congressional demands.[234] The FEC, having the least bargaining power of these agencies because of strong congressional self-interest in its rules, has been unable to resist Congress with much success.

Negotiations are also apparently affected by whether the particular agency program requires periodic or single promulgation of rules. For example, the cyclical nature of the federal grant process affected the Office of Education's strategy, and probably its success in negotiating as well. Because the issues could be temporarily compromised, to be revived the next year, the OE could offer the committees some concessions each year, and persuade them to defer others. In contrast, where rules were to be reviewed only once, negotiations were much more likely to fail. When a veto did occur, it was often followed by another veto of a modified rule that remained unacceptable to Congress.[235]

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[232] *See, e.g.*, p. 1387 & note 74 *supra*.

[233] *See* pp. 1401–02 *supra*.

[234] *See* p. 1385 *supra*.

[235] For example, Congress simply refused to accept the FEA's decontrol program until after the EPCA of 1975, *see* pp. 1391–93 *supra*, and the GSA suffered repeated vetoes on issues under negotiation since the outset of the public access program, *see* pp. 1398–402 *supra*.

On the basis of the overall success of the negotiations, the case studies can be divided into two groups. All of HEW's programs and the FEA's oil decontrol program were eventually implemented, despite the controversial nature of HEW's title IX rule and Congress' initial refusal to countenance oil decontrol. On the other hand, the development of GSA's rules for public access to President Nixon's records and the FEC's regulations for office accounts has been hindered by such disagreement, obstruction, and acrimony that neither set of rules is yet in effect. Where negotiation was successful, the statute applied to persons and institutions outside of government — students, educational grant recipients, and producers and consumers of oil. The unsuccessful programs, on the other hand, attempted to regulate the internal affairs of a branch of government in areas of heightened political sensitivity.

The failure of the latter group of programs is not difficult to explain. Whenever agencies attempt to regulate the internal affairs of a branch of government, the interests evoked by the rulemaking process may be politically irreconcilable for two reasons. First, the self-interest of the regulated branch may be directly in issue, and the strength of that self-interest may preclude compromise. Thus, it is not surprising that GSA refused to propose rules which it felt would threaten the autonomy of the executive branch. Nor is it difficult to understand Congress' refusal to accept rules which would make its members' campaigns financially more difficult and politically more risky. Second, in programs regulating internal governmental matters, there may not be enough outside pressure by directly affected interest groups to bolster the agency and break the deadlock.[236]

B. Public Participation and Interest Group Influence

A vital aspect of rulemaking is the opportunity for participation by all interested parties through notice-and-comment proceedings. The presence of a legislative veto could reduce public participation before the agencies by shifting the focus of attention to congressional review. But in the case studies, public participation before the agencies continued unabated.[237] Two reasons for this are apparent. First, the initial formulation of rules by the agency remains a critical stage in determining their substance.

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[236] *See, e.g.*, p. 1409 *supra*.

[237] The sole exception was GSA, which did not provide for public participation in its rulemaking, *see* p. 1399 & note 157 *supra*, but which did provide a limited substitute in the form of selective consultation with those knowledgeable about presidential papers. For HEW, there seems to have been no diminution in public participation after the veto's application. Interview with Theodore Sky, Assistant General Counsel for Education, HEW, in Washington, D.C. (May 19, 1976).

Public pressure at this stage may prove dispositive if the resulting rule does not awaken congressional interest. Second, even if Congress does stir, a record of considerable public interest and comment can buttress the agency in its negotiations with congressional committees, counterbalancing competing lobbying pressures.[238] This suggests, however, that public participation before the agencies in programs subject to the veto might eventually shift its emphasis from reasoned debate over policy to a showing of political strength meant to impress both the agency and Congress.

Although public comment remained a vital and effective part of the rulemaking process in the case studies, there were indications that the veto machinery may have created opportunities for circumvention of public participation. In certain subtle ways, the presence of congressional review allowed the influence of special interest groups in Congress to affect the substance of rules outside the comment process. When an agency knew of the influence and was aware of the desires of the interest groups, it sometimes attempted to avoid unfavorable review by drafting its rule to satisfy those desires. For example, the FEA took this precaution in attempting to appease the small refiners in its formulation of Energy Action No. 2.[239] Even when the agency did not try to anticipate influence in the hope of less stringent review, the influence, if real, could make itself felt in negotiations with the oversight committee. For instance, pressure directed through the committees helped to force increases in the asset reserves for home and farm equity under HEW's basic grants programs [240] and to insure the inclusion of self-evaluation requirements desired by women's organizations under title IX.[241]

Both of the practices observed in these studies — agency speculation on the effects of pressure on Congress and the application of actual pressure on Congress during negotiations with the agency — contravene the purposes of public comment. The essence of a notice-and-comment proceeding is a public forum in which all interested parties participate openly and on equal footing. Yet an agency's internal drafting decisions and its negotiations with congressional committees are of low visibility,[242] so that both the existence and the effect of special influence are likely to be off the record. The resultant secrecy violates two of the fundamental standards for informal rulemaking: reasoned decisionmaking based on a record and the opportunity for public participants to contest opposing presentations.[243] Moreover, when an agency seeks support for one of its rules from an interest group, that group may later demand a quid pro quo, such as abandonment of another proposed rulemaking. Not only would such a tradeoff violate the canons of open rulemaking, but it also might escape congressional scrutiny.

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[238] Such use of public comment by the agency as a source of bargaining power was evident during review of the title IX regulations, *see* pp. 1389–90 *supra*, and the FEC's office account rules, *see* pp. 1408–09 *supra*.

[239] *See* p. 1394 *supra*.

[240] *See* pp. 1384–85 *supra*.

[241] *See* pp. 1389–90 *supra*.

[242] Recently, however, HEW has made some efforts to open up its drafting process. *See* 41 Fed. Reg. 34811 (1976).

In addition to destroying the openness of rulemaking, the practices observed here violate the ideal of equal access to the rulemaking process. Not all interested parties have the resources both to participate in the public comment proceedings and to lobby the committees effectively in the review process. Those groups having greater resources or prior influence with congressional committees have an additional chance to affect agency action not available to those without such resources or influence.[244] To the extent that the negotiation phase of rulemaking subject to legislative veto authority is determinative, this additional chance constitutes an important special advantage for the few. Indeed, the dynamics of the review process may make a negotiated rule substantially harder to change through subsequent public comment. Once time and energy have been spent in negotiations between an agency and Congress, both the agency and the committee may be reluctant to revise the rules that have been thrashed out.[245]

C. Time Constraints and Delay

Because the legislative veto involves the review of ongoing agency programs rather than the promulgation of legislation, the implementing statutes have required that review take place, if at all, within a limited period of time. While in the case studies an agency's promulgation of rules was ordinarily a slow process, including both comprehensive public comment proceedings and extended internal deliberations, consideration at the review stage was necessarily more abbreviated. Congress had at most several months to review rules that may have taken the agency years to promulgate. The resulting time pressures on Congress significantly affected the quality and thoroughness of congressional review.[246]

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[243] *See* pp. 1433–37 *infra*.

[244] For examples in the case studies of such a second chance to affect a rule, see pp. 1389–90 *supra* (title IX); *pp.* 1393, 1394 *supra* (FEA).

[245] *See* p. 1385 & note 59 *supra* (OE); p. 1401 *supra* (GSA).

[246] Even if the review period is adequate for thorough congressional scrutiny, in practice Congress is likely to wait until the last minute to undertake formal action on a rule, especially a controversial one. Consequently, extending the

Often, the agency's supporting materials were too voluminous to send to Congress; considerable selection was necessary.[247] Hence, agency explanations and justifications amounted to position papers rather than careful explorations of policy alternatives.[248] Under these circumstances, the review process was necessarily an attempt by Congress to second-guess the agency without the benefit of all the facts the agency had developed. The capacity of Congress to exercise critical review of submissions supporting rules varied not only according to whether the subject was technical,[249] but also according to the time required to obtain critical analysis. For example, FEA submissions amenable to computer evaluation were more readily reviewable than those dependent upon empirical investigation.

Aside from time constraints, another significant restriction on the thoroughness of review was the heavy workload of the members and staff of Congress. At times, work on legislation pending before the committees entirely precluded review of potentially controversial rules.[250] More often, the work of the review process, much of which fell to the congressional staff, placed a severe burden on Congress' resources. The negotiations observed in our case studies between the staffs of the committees and the agencies imposed a greater burden on the congressional staff than much legislation. Moreover, there is some evidence that even with the present sporadic application of veto authority, an increase in staff alone would not have allowed the limited number of Congressmen to discharge their review functions effectively.[251]

As a consequence of Congress' heavy workload, even the committee members were not normally as familiar with a rule under review as agency personnel, or as a reviewing court would be.[252] This suggests that technical rules may not be the only ones likely to cause substantial difficulties in congressional review. Given the complexity characteristic of much administrative regulation,

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review period does not necessarily relieve congressional haste, as events surrounding review of HEW's title IX regulations demonstrate. *See* pp. 1389–90 *supra*.

[247] *See, e.g.*, p. 1389 & note 87 *supra* (title IX); *pp.* 1394–95 *supra* (FEA); p. 1408 *supra* (FEC).

[248] *See* pp. 1394–95 *supra* (FEA); p. 1407 *supra* (FEC). Indeed, one way an agency can forestall critical review of its rules by Congress is by defining the issues and drawing attention away from alternatives.

[249] *Compare* p. 1384 *supra* (OE) *with* p. 1395 *supra* (FEA).

[250] *See* notes 55, 56 *supra* (OE).

[251] Congressional staff perform much of Congress' oversight function at present, in the absence of veto provisions. 2 STUDY ON FEDERAL REGULATION, *supra* note 35, at 17. It does not seem wise to increase existing dependence on them.

[252] *See, e.g.*, *Hearings on the GSA Regulations Implementing the Presidential Records and Materials Preservation Act Before the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. 25 (1975).

even legal issues — normally well within the expertise of Congressmen — may require substantial amounts of time and effort to resolve. The need to commit this time and effort may in practice place complex legal issues beyond the capacity of Congress to review.[253]

While the time limits for review may test Congress' ability to review rules carefully, the process of review itself may delay or disrupt an agency's programs. In the case studies, the disadvantages of delay caused merely by having rules lie before Congress varied substantially. The greatest disruption to an agency's program occasioned by the very existence of a review requirement was the lapse of the FEC's rules for the 1976 election, due to the adjournment of the Ninety-Fourth Congress before the review period expired. This incident illustrated how congressional recesses or adjournments can increase delays substantially if the period for review is defined in terms of legislative rather than calendar days. For HEW, whose grant programs were subject to review periods based either on calendar deadlines or on legislative days, delay was a pervasive problem because the agency had to complete the rulemaking process within both statutory deadlines and the constraints of the fiscal year. Delay seemed to be less of a problem for the FEA, because its rules were subject to very short review periods. There was some delay, however, from FEA hesitation to submit a completed rule to Congress while it awaited a politically propitious moment to do so. This kind of delay might have important costs, but they are likely to remain unseen.

Although shortening the review period reduces delay inherent in the review process, a long review period may produce prolonged uncertainty regarding a rule's fate. For example, all three vetoes of the GSA rules occurred from five to six months after their submission. Similar uncertainty may be produced by protracted informal negotiations between the agency and congressional committees. When review does occur, as GSA's experience also demonstrates, there arise possibilities for indefinite interruptions in agency programs, with no effective rules in the interim.

One means of ameliorating delay problems is suggested by HEW's short-lived practice of submitting proposed rather than final rules to Congress, so that the periods for notice and comment and for congressional review would run concurrently.[254] HEW's experience revealed several disadvantages of the practice, however. To the extent that the agency changes its rule other than to reflect congressional views, the procedure seems a waste of time for Congress. Also, the agency's fear of renewed congressional review could deter rule changes in response to public comment.[255] On the other hand, if the agency believes that congressional approval is forthcoming, it will be tempted to conduct the public comment proceeding merely as a formality to support rules that it already plans to adopt. HEW's efforts to compress the review period suggest the further possibility that time pressure may deter agencies from employing public participation in rulemaking. Although reduction of public comment periods was usually forbidden by statute in the case studies, there is no guarantee that agencies lacking such constraints would not curtail public comment. In any event, the presence of a review period is a deterrent to the common agency practice of extending public comment periods beyond statutory minimums.[256]

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[253] Lack of time is not the only factor impairing the quality of review, however. Congress has not excelled in its function of general oversight of agency action, *see generally* 2 STUDY ON FEDERAL REGULATION, *supra* note 35, and it has yet to decide exactly how it should review particular agency rules under a legislative veto provision. *See* pp. 1429–30 *infra*.

[254] *See* p. 1388 *supra* (OE).

D. Political Accountability

A primary purpose of the legislative veto is to increase the political accountability of administrative regulation. In theory, the veto power insures that agency rulemaking is consistent with the intent of Congress. Experience under existing vetoes, however, reveals that political accountability is likely to be attenuated in practice. Although the veto power is meant to be exercised by one or both of the houses of Congress, floor votes of an entire house on the merits of a veto resolution were rather infrequent. Most of the effective review occurred at the committee or subcommittee level, often focusing on the concerns of a single chairman or member.[257] Indeed, much settlement of policy occurred in behind-the-scenes negotiations between the staffs of the committees and the agencies.[258] There were even signs that committees engaging in relatively intense negotiations with an agency tended to keep matters within committee in order to preserve their negotiating stance, although the issues might merit floor review.[259] Under these circumstances, the power of review was really exercised by congressional committees and their staffs, rather than by either house as a whole. By reducing the number of issues reaching Congress as a whole through negotiations, the committees and their staff could thus settle policy issues in a way in which the house as a whole might not, were it asked to decide.

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[255] HEW planned to resubmit rules whenever a "substantial" change occurred after congressional review. *See* note 77 *supra*.

[256] Congress could minimize delay problems by means of a simple procedural device, such as a statutory provision that rules would take effect after the usual 30-day period absent an action to trigger review by a congressional committee. In fact, this is the British practice. *See, e.g.*, J. GRIFFITH & H. STREET, PRINCIPLES OF ADMINISTRATIVE LAW 90–92 (5th ed. 1973). Such a rule could confine delay to rules actually given some scrutiny by Congress. It would not resolve, however, the problem of policy impasse following the exercise of a veto, as occurred with GSA's rules.

[257] Thus, a veto provision tends to increase an already considerable congressional dependence on committees both for the substance of legislation, HOUSE SELECT COMM. ON COMMITTEES, REPORT ON COMMITTEE REFORM AMENDMENTS OF 1974, H.R. REP. NO. 93–916, 93d Cong., 2d Sess., pt. 2, at 9–12 (1974), and for oversight, Robinson, *supra* note 1, at 954–55.

Despite recent attempts in Congress to broaden the perspective and makeup of its committees,[260] they inevitably are bodies of relatively narrow composition compared to Congress as a whole.[261] Each member of a committee is responsible only to his or her own constituency, and the total constituency of any one committee is far from national in scope. Moreover, the "stacking" of oversight committees with members favorable to an agency or to the group it regulates is not unknown; [262] this practice can forge agency-committee alliances which reinforce the capture of agencies by the interest groups they purport to regulate.[263] Whenever it does not report a veto resolution to the floor of a house, the committee, with its narrow constituency, wields all of Congress' review power. In such a case, the ideal of *The Federalist* [264] — national responsibility to a national constituency — is not achieved. Furthermore, if committee negotiations receive no national publicity, as has so far been the case, those few members exercising the power of Congress may not be called to account even by their own constituencies.

This committee-based review may result in the effective amendment of statutes, whether or not those involved realize it. For a process of negotiation, once initiated, is likely to take on a life of its own. Thus, in the case studies a committee and an agency seemed sometimes to find themselves drifting over time to a position having no necessary relationship to the original statutory intent.[265]

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[258] These negotiations gave the committee staffs a considerable amount of real power to affect policy because staff members could often determine which issues would reach the attention of members of Congress.

[259] *See* p. 1385 *supra* (OE).

[260] *See, e.g.*, 123 CONG. REC. S2276–316 (daily ed. Feb. 4, 1977). *See also* Adams, *supra* note 2, at 539 (1976). *See generally* H.R. REP. NO. 93–916, *supra* note 257; *Committee Organization in the House: Hearings Before the House Select Comm. on Committees*, 93d Cong., 1st Sess. (1973).

[261] *See* H. FRIENDLY, *supra* note 1, at 169–70; Watson, *supra* note 6, at 1054.

[262] *See* 2 STUDY ON FEDERAL REGULATION, *supra* note 35, at 109.

[263] *See id.*

[264] THE FEDERALIST NO. 10 (J. Madison).

Although the ripening of informal negotiations into committee hearings might have been expected to increase the political accountability of the review process, in fact its effects were not striking. Hearings provided some visibility for the issues discussed, but they were not always effective in awakening the attention of members of Congress outside the oversight committee. As reactive rather than creative measures, veto resolutions both deserved and received less attention than legislation. Moreover, when a change wrought by a committee at the instance of an interest group had only a diffuse impact on the public at large, the classical logic of lobbying dictated that the change would evoke little outcry.[266]

One other factor affected the political accountability of the veto process. In all the cases studied except that of the FEA, Congressmen characterized their role as limited to reviewing the legality of the agency's rule, that is, its conformity with statutory purpose. Nevertheless, in all cases congressional review was primarily based on policy. The reason is not hard to divine: the traditional and constitutional role of Congress is the formulation and alteration of policy. Moreover, a major reason for imposition of veto authority has been the indecision of Congress on policy issues, and a desire to check the agency's later resolution of them.[267] Members of Congress are unaccustomed, and the institution is ill-equipped, to make a restrained and judicious examination of a rule's subservience to statutory purpose. Yet Congress' profession, despite these institutional realities, to review rules only for conformity with statutory intent has serious implications for the political accountability of the veto process. Review on the putative basis of legality implies that Congress is forming no new policy but is merely making sure that the conditions of the original delegation are met. The result is that veto resolutions receive less public visibility and less attention from members of Congress outside the oversight committees than, as policy decisions, they deserve.

In the case studies, congressional review had either of two results. One was successful compromise between the committees and the agency on the content of the rules, as was normally the case with HEW. The other was the failure of negotiations and a veto, with the likelihood of impasse for an indefinite period. In either case, Congress did not form policy as a whole and in a politically accountable way. Instead, either a committee formed policy in conjunction with the agency, or one house of Congress rejected the policy made by the agency, requiring the agency to try again. In the former case, the negotiations were not publicized and the power of Congress was exercised by a few. In the latter case, because veto resolutions were negative in effect and because review was often explained as limited to the consistency of a rule with an earlier statute, a Congressman's vote did not seem to carry the responsibility of a vote on legislation. In both cases, the accountability of Congress to the people fell short of the ideal of national responsibility to a national constituency.

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[265] The OE's basic educational grants program, GSA's public access rules, and the FEC's office accounts rule seem the best examples of this.

[266] This was the case in the HEW basic grants program, in which the increase in exemptions for home and farm equity and the consequent reduction in funding for students whose families had no substantial real assets was not perceptible enough to evoke sufficient complaint to attract the attention of Congress. *See* pp. 1384–85 *supra*.

[267] This purpose of veto provisions is incompatible with legality review, since a statutory standard against which to measure the agency action will be lacking.

E. The Relationship of the Agencies and Congress in the Absence of Veto Provisions

Most of the characteristics of the legislative veto process found in the case studies do not typify the current relationship between Congress and the agencies in the absence of veto authority. The principal difference is the negotiating process between congressional committee staffs and agencies, which seldom occurs in the absence of a veto provision.[268] Indeed, the chief effect of the veto power seems to be an increase in the power of congressional committees and in the practice of negotiating over the substance of rules. It is difficult to be precise here, because many of the differences are matters of degree and the phenomena under discussion are of low visibility. Consequently much existing information is anecdotal.[269] Nevertheless, the case studies confirm that the legislative veto power significantly alters the working relationship between Congress and the agencies.

In the absence of veto power, congressional committees have occasionally paid close attention to the substance of particular agency rules, either in their oversight capacity or during the appropriations process. Perhaps the most vivid example is that of the House Commerce Committee's oversight of the regulation by the Federal Communications Commission (FCC) of pay television. For more than a decade, the committee succeeded in preventing the FCC from authorizing pay television.[270] After the FCC proposed authorizing pay television in 1957, the committee, under heavy pressure from broadcasters and theater owners, passed a resolution requesting delay. Through threats, letters, resolutions, and hearings, it forestalled action until 1968 without reporting any legislation to the House. These actions surely affected not only the timing but also the substance of the FCC's regulations, which ultimately authorized pay television only under heavy restrictions.[271]

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[268] The case studies unearthed instances of negotiation by HEW staff and committee staff in programs without veto provisions, *see* pp. 1386, 1389 *supra*. But all of them occurred after the OE's basic grants program, which has a veto provision, had initiated negotiations between HEW and the committees.

[269] For instance, the Chairman of the House Commerce Committee once spent many hours with the Chairman of the FCC in "working over" the cable television regulations before their issuance. *See* K. DAVIS, DISCRETIONARY JUSTICE 148 (1971). The literature on congressional oversight of the agencies does not usually refer to such a process of negotiation. *See* materials cited in note 279 *infra*.

In another case of close congressional oversight, the FCC used proposed rulemaking to bargain for legislation in the well-known deintermixture controversy, which resulted from the FCC's attempts to alleviate the congestion of television channels by assigning VHF and UHF channels to separate cities. At the cost of abandoning its experiments on the deintermixture of these two modes of broadcasting in certain communities, the FCC was able to obtain long-sought legislation authorizing it to require the makers of television sets to provide both UHF and VHF reception.[272] This case, of course, is ultimately an example of an agency's success in dealing with Congress as a whole, and not simply with a committee seeking to stall its programs.[273]

There are other examples of committee pressure to suspend an agency rulemaking program. For example, after the Federal Power Commission (FPC) asserted jurisdiction to regulate the sale of natural gas to pipeline companies, it terminated its rulemaking program despite clear Supreme Court sanction of its authority to continue,[274] because opposition in Congress was strong enough to pass a bill in the House.[275] In another case, an appropriations committee, which felt it had been defied for at least a year by the FPC, directed the agency not to spend its funds to establish regulation of cooperatives until legislation settled the issue.[276]

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[270] Robinson, *supra* note 1, at 955 n.24.

[271] In a rather similar situation, the FCC proposed a rule on the frequency of broadcast commercials, but abandoned its rulemaking after the industry pressured the House Commerce Committee, which held hostile hearings and reported a bill. *See* W. CARY, POLITICS AND THE REGULATORY AGENCIES 46–47 (1967).

[272] G. ROBINSON & E. GELLHORN, *supra* note 9, at 156–57.

[273] There is some doubt, however, that this episode reflects a deliberate and effective effort on the FCC's part to trade rulemaking for legislation, as opposed to a fortuitous resolution. *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 532–35 (1970).

[274] *See* Interstate Natural Gas Co. v. FPC, 331 U.S. 682 (1947).

[275] W. CARY, *supra* note 271, at 50–51.

These examples bear out William Cary's observation that agencies seldom take controversial steps in rulemaking without some support in Congress, especially in the committees.[277] Yet they have certain similarities to one another which distinguish them from the review process characteristic of the case studies. First, committee review in the absence of a veto provision frequently applies pressure at the instance of regulated interests to stop an agency rulemaking program entirely. It does not engender a detailed bargaining process over the substance of rules, since the industry pressure is directed toward not having any at all. Also, committee attempts to stall an agency program in the absence of the veto power usually occur when legislation that may affect the program is under serious consideration.[278] Legislation was considered less frequently in the case studies because the committees had an alternative available to resolve their disputes with the agencies — the veto of a rule.

These differences in practice reflect the existing structure of congressional oversight of the agencies,[279] which does not foster detailed negotiations over the substance of impending rules. Review of rules is not presently a systematic process but is triggered by controversial rules.[280] While a legislative veto requires routine submission of rules to Congress for review, in its absence oversight committee hearings occur sporadically and thus do not provide a regular opportunity to negotiate the substance of rules with agency personnel.[281] The appropriations process does provide a regular opportunity for scrutiny of agency programs, but its focus is on funding, not on the details of policy.[282] As for intervention by individual Congressmen on behalf of constituents, it is by definition sporadic and irregular. Finally, the review of appointments deals with personal qualifications and broad policy and only obliquely with proposed rules.[283] In contrast with these traditional oversight techniques, review under a legislative veto scheme is specifically and narrowly focused on the substance of proposed rules. Thus the veto, unlike any of the traditional oversight techniques, permits regular and systematic examination of the substantive details of an agency's program.

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[276] S. Rep. No. 1–269, 88th Cong., 2d Sess. 8 (1964).

[277] W. Cary, *supra* note 271, at 53.

[278] In a well-known example, the FTC postponed its proposed cigarette rule until the issue was settled by legislation. H. Linde & G. Bunn, Legislative and Administrative Processes 915–48 (1976).

[279] For discussions of existing oversight practices, see W. Cary, *supra* note 271; H. Friendly, *supra* note 1, at 163–73; H. Linde & G. Bunn, *supra* note 278; M. Ogul, Congress Oversees the Bureaucracy (1976); Newman & Keaton, *Congress and the Faithful Execution of Laws — Should Legislators Supervise Administrators?*, 41 Calif. L. Rev. 565 (1953).

[280] *See* 2 Study on Federal Regulation, supra note 35, at 120–21. There are very frequent informal contacts between congressional members and staff and the agencies, *see id.* at 65–66, 81, which may help to identify controversial issues warranting the members' attention. *See also* Clark v. Valeo, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977) (Leventhal, J., concurring), *aff'd mem. sub nom.* Clark v. Kimmitt, 45 U.S.L.W. 3789 (U.S. June 6, 1977). *See generally* Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 Ad. L. Rev. 415, 419–21 (1976).

[281] Oversight hearings have, however, increased in frequency in recent years. *See* 2 Study on Federal Regulation, *supra* note 35, at 80–81.

Without the veto, a committee displeased with an agency rule has two major options. It may stage an embarrassing oversight hearing, or it may propose legislation to rectify the problem it perceives. But any legislation it proposes must obtain passage in both houses of Congress and approval by the President or a veto override. Until the proposed legislation is adopted, a controversial agency rule, if issued, remains in effect. If the committee chooses to hold a hearing, the agency may resist, testing the committee's power to obtain legislation. With the legislative veto, committee power is greatly enhanced. If a veto resolution is reported out of committee, it may need to pass in only one house, and a vote by other Congressmen for it does not entail the same responsibility as a vote for legislation affirmatively forming policy. Congressmen may be persuaded to support a committee recommendation for a veto as a low-cost endorsement of the oversight power of Congress without fully considering the cost to the interrupted program. Since the veto provides an easier method for altering agency policy, it reduces the incentive of the oversight committees to sponsor legislation. Because the veto is negative, and because it reduces pressure on committees to report legislation affirmatively resolving policy disputes with agencies, it increases substantially the chance that no policy will be formed by Congress or by the agency.

IV. THE DESIRABILITY OF A GENERAL LEGISLATIVE VETO FOR RULEMAKING

An initial question in evaluating the desirability of a statute subjecting most informal rulemaking to legislative veto authority is the extent to which our case studies provide a valid model for analysis. At first glance, there seems to be one obvious distinguishing feature. In the case studies Congress selected a group of programs for which it had special concern, and subjected them to active review. Given the vast amount of rulemaking activity in the federal government,[284] it seems clear that Congress has neither the time nor the inclination to extend active review under a general veto power to more than a few highly controversial rules. Even a substantial increase in congressional staff to canvass forthcoming agency rules would not necessarily lead to frequent review by Congressmen, because their number is fixed and their time is limited. Meaningful review, whether by Congressmen or their staff, seems likely to be episodic, because much agency rulemaking is routine, technical, or otherwise noncontroversial.[285]

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[282] *Id.* at 18–43.

[283] *See generally* SEN. COMM. ON COMMERCE, 94TH CONG., 2D SESS., APPOINTMENTS TO THE REGULATORY AGENCIES 375–418 (Comm. Print 1976).

Reflection suggests, however, that a view which minimizes the practical impact of a general veto provision is oversimplified. It does not adequately account for the nature of rulemaking and the nature of the agencies' present relations with other branches of government. Under a general legislative veto provision, agencies may be inclined to abandon rulemaking in favor of other procedures less vulnerable to congressional scrutiny for the development of policy. Moreover, if in practice Congress does not exercise the veto power assiduously, the broader delegations of authority which it fosters may result, contrary to expectations, in a net decrease in control over agency discretion. Partial duplication of the judicial function by Congress may create profound problems for the courts in their review of both congressional action and agency rules. Finally, in its use of the veto power Congress may in practice venture beyond mere supervision to improper interference in the administrative function.

A. Effects on Agency Behavior

The agencies have been repeatedly criticized for pursuing an ad hoc, "rudderless" course that emphasizes adjudication, rather than moving decisively to form policy by rulemaking.[286] Rulemaking is frequently relegated to relatively technical or noncontroversial aspects of an agency's mission precisely because the agency does not choose to resort to it for resolution of hard policy issues.[287] The reasons for this practice are instructive in evaluating a general veto provision.

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[284] *Congressional Review Hearings, supra* note 4, at 143 (statement of Rep. Levitas).

[285] Proponents of general veto provisions often recognize this, and argue that the veto is meant for egregious agency rules. *E.g., id.* at 142; *id.* at 166 (statement of Rep. Clausen); *id.* at 178 (statement of Rep. Hutchinson).

[286] *See generally* Freedman, *supra* note 32, at 1054; Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 53 (1969); Robinson, *supra* note 1, at 957, 967. The use of rulemaking does not guarantee vigorous policy formation, of course, but it provides the opportunity for it. *See* Robinson, *supra* note 273, at 526–28.

Currently, strong incentives for agencies to avoid vigorous policymaking inhere in the relations of the agencies to Congress.[288] Many of the policy issues that agencies do not currently resolve arise under broad delegations by a Congress which was unwilling or unable to resolve the issues itself. Political pressures or uncertainties that prevented a statutory resolution of policy in Congress also hamper resolution by the politically weaker agencies.[289] A vigorous agency assertion of policy is likely to meet with countervailing pressure from interest groups lobbying congressional committees. Consequently, agencies may resort to adjudication — which is constitutionally protected from direct congressional supervision — for the making of policy.[290]

The case studies suggest that a general veto provision will increase the power of interest groups to block or deflect agency policy initiatives through pressure on congressional committees. Such pressure would not always require the detailed and time-consuming negotiation process that occurred in the case studies. A committee not having the time or inclination to negotiate a given set of rules could simply report a veto resolution, which, if passed by the entire house, could lead to the kind of indefinite policy impasse found repeatedly in the case studies. Alternatively, it could attempt to deter agency submission of a rule altogether.[291] Whenever an agency is not statutorily restricted to policymaking by rule, the threat of such pressure is likely to drive it toward greater use of adjudication. Unlike the agencies involved in the case studies, many federal agencies are free to choose adjudication. Thus, by increasing agency reliance on adjudication, a general legislative veto provision might have pervasive effects on the nature of policymaking in federal agencies.

To the extent that a general veto power would increase reliance on adjudication at the expense of rulemaking, it would have the reverse of the effect intended, for it would encourage the agencies to act in ways that are even less amenable to congressional oversight than rulemaking is now. Other disadvantages of excessive adjudication would also be increased, principally delay in forming overall policy. Congress could attempt to avoid excessive resort to adjudication by requiring the agencies to engage in rulemaking for the formulation of policy. But both Congress and the courts have traditionally recognized broad discretion in the agencies to proceed by adjudication or rulemaking as their judgment dictates.[292] Any requirement to proceed exclusively by rulemaking could sensibly be imposed only after careful study of each program involved and might be overly rigid even then.

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[287] *See* Freedman, *supra* note 32, at 1054–55; Posner, *supra* note 286, at 60, 71.

[288] *See generally* W. CARY, *supra* note 271, at 57–59; pp. 1420–23 *supra*.

[289] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 25 (1965).

[290] *See* Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 578–79 (1972).

[291] For examples of this in the case studies, see pp. 1391–92 *supra* (FEA).

A general legislative veto might have a particularly disturbing effect on the independent regulatory agencies, since their freedom from presidential supervision may make them more susceptible to congressional control than the executive agencies dominating the case studies.[293] They currently operate under broad delegations and have traditionally relied heavily upon adjudication. These agencies have recently shown encouraging signs of moving away from full adjudicative procedures toward rulemaking for the formulation of policy. It would be unfortunate if the indirect effects of a general veto provision were to reverse this trend. In addition to increasing their reliance on adjudication, a general veto provision might adversely affect the independent agencies in two ways. First, it might produce frequent policy impasse between these agencies and Congress due to vetoes, because most of their rules are of the kind that would be subject to review only once, and because the congressional committees overseeing them have demonstrated their capacity to stall rulemaking through informal pressure.[294] Second, the presence of a veto provision would provide another opportunity, after public comment, for regulated interests to obtain changes in a rule or to block passage of a rulemaking program. This opportunity would exacerbate current problems of the "capture" of the independent commissions by their regulated constituencies.

B. Effects on Congressional Delegations of Rulemaking Authority

However ineffective the delegation doctrine has been in limiting broad grants of legislative power,[295] its underlying purposes have not lost their force, and it still imposes some constraints upon statutory delegations. Nevertheless, the courts have realized that the requirement for policy standards in legislation can be overemphasized at the expense of other means of confining administrative discretion.[296] Unwilling to require Congress to decide complex policy questions in advance under the delegation doctrine, the courts have emphasized various means of assuring that agency action is authorized and that agency procedures are accurate and fair. This is illustrated by *Amalgamated Meat Cutters v. Connally*,[297] which upheld a grant of authority to the President to establish wage and price controls, even though the statute established no clear standard for the level or timing of their imposition. The court derived adequate limits on the President's discretion from several sources. From the historical context and other wage-price control statutes it was able to divine a congressional purpose of fair and equitable stabilization sufficient to guide the President. Further, it noted statutory limits on the President's power to single out an industry for special treatment and the limited time for which controls could be applied. Finally, the court incorporated the procedures of the Administrative Procedure Act and expanded the scope of judicial review. As Judge Leventhal emphasized in *Meat Cutters*, the delegation doctrine should be viewed as a requirement that Congress impose controls of any appropriate sort on the exercise of delegated power.[298] Since legislative vetoes are designed to provide controls on agency power delegated by Congress, this approach suggests strongly that Congress has not only the right but a constitutional duty to oversee the exercise of its delegated powers through some technique such as the veto.

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[292] NLRB v. Bell Aerospace Co., 416 U.S. 267, 290–95 (1974). In some instances, Congress has required rulemaking by statute, but it has not done so for the independent regulatory agencies. *See Congressional Review Hearings*, *supra* note 4, at 426, 478, 480.

[293] It is, however, easy to overstate the differences between executive and independent agencies in terms of actual freedom from presidential control. *See* Robinson, *supra* note 1, at 950–52. Nevertheless, Congress may pay special attention to the independent agencies. *Id.* at 954–55.

[294] *See* pp. 1420–22 *supra.*

[295] *See* pp. 1372–73 *supra.*

Further consideration, however, suggests that in practice the legislative veto may fail to define more exactly the limits of agency discretion. Existing veto provisions, particularly those in the energy statutes, often accompany broader grants of power than Congress would have made without having the veto power as a check upon their exercise. And Congress has forgone subsequent opportunities for legislative resolution of issues emerging in rulemaking programs subject to veto, preferring instead to react to the agency's policy initiatives.[299] These facts, coupled with Congress' frequent difficulty in resolving policy by statute, indicate that a general veto provision might encourage Congress to make broader delegations than it would otherwise. If this occurs, the veto will produce a net increase in congressional control of the agencies only to the extent that there actually is close review pursuant to it. Yet under a veto statute broadly applicable to rulemaking, limits on time and resources would make it impossible for Congress to exercise continuing, close review, even with a massive increase in staff. It therefore seems likely that only a few rules would receive the careful scrutiny necessary to fulfill the assumptions underlying broad original grants of power.

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[296] *See generally* G. Robinson & E. Gellhorn, *supra* note 9, at 102–06.

[297] 337 F. Supp. 737 (D.D.C. 1971) (three-judge court) (Leventhal, J.).

[298] *Id.* at 746–47.

[299] *See* pp. 1409–10 *supra*.

Thus, this proposed technique for increasing congressional controls on delegated powers may actually result in *decreasing* those controls in practice. As *Meat Cutters* emphasized, constraints on the agencies in statutes may be quite diverse, but they should work together, and not against one another, to satisfy the ultimate goals of the delegation doctrine.[300] Offered as a means of implementing the requirements of the delegation doctrine, legislative veto schemes might ultimately be viewed as violating it.

Whatever the requirements of the delegation doctrine, the legislative veto may be ill-suited as an aid to the final resolution of policy for several reasons. First, it is negative in its impact. Unlike legislation, it does not promulgate a new rule, but merely leaves a void. Second, under a one-house veto, irreconcilable disagreement between the houses of Congress may prevent the formulation of any effective policy by the agency. Finally, as experience shows, some controversies between the agencies and Congress are long-standing, leaving a policy vacuum without any strong impetus toward a final resolution. Indeed, the legislative veto may contribute to a vicious circle now present in regulatory policymaking. Congress, beset by conflicting political pressures or uncertain of the best approach to a new problem, makes a broad delegation to an agency without resolving policy. The agency, subject to the same pressures or uncertainties, then proceeds to deal with issues in an ad hoc fashion, emphasizing adjudication, without forming any clear policy. This failure of the agency to resolve the original issues leaves Congress with nothing concrete to consider, thereby disadvantaging it in later attempts to meet the policymaking responsibility it did not discharge in the original delegation.[301] To the extent that the legislative veto encourages Congress to make broad delegations in the first instance with the hope of resolving policy upon executive initiative, there is a danger that it will exacerbate current problems.[302]

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[300] 337 F. Supp. at 748.

[301] H. FRIENDLY, *supra* note 1, at 163–72; Freedman, *supra* note 32, at 1054–55; Wright, *supra* note 290, at 585–86.

[302] Even if a rule undergoes full congressional review and escapes a veto, this may not indicate a determination by Congress that it is optimum policy, but only that it is not unacceptable enough to be vetoed.

C. Effects on Judicial Review

The federal courts have yet to confront the question of how to review an agency's rules when they are subject to a legislative veto.[303] The question is a complex one, involving the relationships between the three branches of government and in some cases the "fourth branch" — the independent regulatory agencies — in all their permutations. To what extent should courts defer to congressional judgments on the legality of a rule, especially if they seem mixed with policy considerations? Although congressional review is often ostensibly based on legality, consideration of policy in a legislative body is inevitable.[304] To what extent should courts intervene if congressional review is explicitly based on policy? These are delicate questions freighted with separation of powers concerns.

It is fundamental that the courts, not Congress, have the ultimate responsibility to interpret the law.[305] To the extent that congressional review of rules duplicates the function of the courts, it does not seem a wise use of congressional time. Moreover, Congress is ill-equipped, both by inclination and competence, to determine its own former intent with the care and restraint customary in judicial review. The members of Congress have less time and no better resources (briefs, memoranda of law) than the federal courts. One might suggest that Congress has better access to "real" legislative history than the courts or the agencies. But the subjective intent of committee members not recorded in publicly available committee hearings or reports and not reflected in floor debates seems better characterized as views on policy than as evidence of the intent of Congress. It is not a part of the formal legislative history that can legitimately be read into the statutory language as having been accepted by Congress as a whole. For this reason, when Congress is unclear initially in forming legislative history, it is unlikely to contribute more than the agencies or the courts in later attempts to reconstruct it. Furthermore, the validity of a legislative purpose that is purportedly part of the law but not reflected in ordinary sources of legislative history diminishes as time passes and a new Congress with new members convenes.[306]

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[303] Clark v. Valeo, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977) (en banc), *aff'd mem. sub nom.* Clark v. Kimmitt, 45 U.S.L.W. 3789 (U.S. June 6, 1977), did not reach the issue; nor has the GSA litigation, *see* note 170 *supra.*

[304] An example of policy review masquerading as legality review occurred in hearings on GSA's public access rules. The question of the appropriate role for the Administrator was argued as a matter of the legality of subdelegation within the agency. *See* p. 1399 *supra.* GSA's legal argument against the validity of a subdelegation sought by the committees seemed weak enough to suggest that it was a cover for a power struggle. On the other side, congressional focus on archivists' expertise on questions of public access may have been a ruse for distrust of the Administrator.

[305] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

The more appropriate role for congressional review is policy review, because it is a natural part of the legislative process that is not engaged in by the courts. Even policy review, however, may not have the characteristics claimed for it in veto proposals. The level of congressional interest in a rule will depend on its political sensitivity, not the persuasiveness of the agency's justifications for it or even its consistency with other regulatory programs. This means that the process is not necessarily a coherent one. Although the same inattention to coherent and reasoned formulation of policy may be present in the legislative process, it is likely to be more pervasive in the context of oversight. This is true because oversight has had a lower priority in Congress than legislation and Congress has traditionally been weak in its exercise.[307] Yet despite its shortcomings in the context of the legislative veto, policy review is clearly more appropriate than legality review for purposes of congressional oversight.

Hence, if Congress treads on judicial ground by declaring a rule ultra vires in a resolution, it seems appropriate for a court to disagree. That would restore the rule's effectiveness, subject to an authorized veto on policy grounds or to statutory change. On the other hand, if Congress voids a rule on policy grounds, the wisdom of its judgment should ordinarily be beyond judicial review.

Occasionally, the statute governing congressional review requires not only that a veto be for ultra vires action, but that Congress make findings.[308] This latter requirement is not likely to prove enforceable in court. Consider the extent to which the findings should have to be adequate explanations in the typical administrative law sense.[309] For example, the required findings in the veto resolution for HEW's title IX regulation would be considered unacceptably conclusory if they came from an agency.[310] Yet it would be difficult for a court to ask for more detailed explanation without making an extraordinary intrusion on the legislative process. Thus, a court's reluctance to direct Congress to speak coherently in giving reasons for a veto would arise from sensitivities that have led to the demise of the standards requirement of the delegation doctrine.[311] This suggests that when a veto occurs, the comparative persuasiveness of Congress' findings with those of the agency will not be reviewed.

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[306] *See Congressional Review Hearings*, *supra* note 4, at 376.

[307] *See*, *e.g.*, Ribicoff, *supra* note 280.

[308] *See* p. 1386 *supra*.

[309] *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW §§ 140–142 (1976).

[310] For a reprint of the findings, see *Title IX Hearings*, *supra* note 74.

[311] *See* pp. 1372–73 *supra*.

If Congress does not veto an administrative rule, a court can review its legality in the normal way. But what inference is it to make if the rule has received attention but no veto from Congress? Some statutes provide that the failure of Congress to veto a rule shall not be construed as ratification; such provisions must be considered.[312] Certainly rules that receive little or no attention from Congress should not be viewed as ratified by it.[313] However, when a floor vote is held in both houses and the rule survives, it could be argued that Congress has ratified the rule. Nevertheless, if congressional review is based on legality, the courts should retain a duty to determine that question. Even on policy review, Congress' failure to veto a rule does not necessarily mean there has been attention to legality, or that Congress should be viewed as an authority regarding that determination. Thus, judicial review would be appropriate in either case. If the veto process has not reached the stage of producing committee reports or findings by one or both houses of Congress, there is no basis on which a court can identify even an implied judgment by Congress as a whole. In the end, the irony of a ratification doctrine is that it would give legitimacy to precisely those rules raising the greatest congressional displeasure short of veto. This too suggests its inappropriateness.

Congress may impose statutory limits on judicial review of rules subject to veto. For instance, the FEA's legislation contains a provision forbidding judicial invalidation of its rules for arbitrariness or for the absence of sufficient factual foundation.[314] This provision was designed to make the substance of rules a matter for internal resolution between the Executive and Congress.[315] Broad use of similar provisions limiting judicial review could insulate great numbers of rules from scrutiny by the judiciary without subjecting them to close scrutiny in Congress as a substitute. If increased accountability of administrative rules is the goal of veto provisions, restricting judicial review without ensuring congressional review is a backward step.

Recent developments affording closer judicial review of agency action, in rulemaking as well as other areas,[316] are fundamentally inconsistent with the likely consequences in practice of a general legislative veto. We argued above that the courts should not regard congressional action short of a veto as the ratification of a rule. Perhaps, therefore, the courts will review rules not vetoed in the usual fashion. But to the extent that the presence of the veto causes the agencies to draft rules to meet political considerations unrelated to public procedures, as occurred frequently in the case studies, review by the courts will be made more difficult. Courts will be less sure that an agency rule is what it purports to be if unknown considerations may be the ground of decision. Courts have not prospered in their searches for motivation underlying official action; situations encouraging or necessitating that search are to be avoided.[317] Perhaps legislative veto procedures could be altered to protect the courts' capacity to review agency rules.[318] Existing procedures, however, do not seem to suffice.

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[312] *E.g.*, note 64 *supra*.

[313] *But see* note 38 *supra*. If ratification is thought possible, the most common and effective form of congressional review, committee action, might receive some weight.

[314] *See* note 118 *supra*.

[315] While ordinarily the courts defer to rational congressional judgments on policy, such deference assumes that Congress has actually made a judgment. When a rule has received less attention in Congress than a floor vote in both houses, no determination by Congress as a whole has occurred.

One obvious but important practical effect of the combination of congressional and judicial review is the increased potential for impasse. As a separate branch of government, the courts have a duty to insure that agencies adhere to constitutional and statutory norms and that the actions of Congress remain within constitutional bounds. In the process of fulfilling this duty, the courts may create obstacles to policy accommodation between Congress and the agencies. For example, the Supreme Court's decision in *Buckley v. Valeo*,[319] which invalidated the composition of the FEC on constitutional grounds, caused much of the prior accommodation between the FEC and Congress to be wasted.[320] Such obstacles are not created solely by decisive constitutional rejection of the governing statute. As the GSA's response to *Nixon v. Administrator of General Services* [321] demonstrates, mere dicta may provoke or exacerbate conflict between the agency and committees charged with the responsibility for congressional review.[322] The possibilities are endless. Repeated remands are common in administrative law; their potential for disruption of emerging political accommodations between an agency and Congress is obvious. Finally, there is the possibility that a court will invalidate the only rules which can survive a congressional veto, creating a deadlock that the agency cannot break.[323] It could be argued that this potential for disruption and wasted effort is the price of government by reasoned judgment. Certainly delay and disruption are common features of the political and judicial processes. Yet at present the interactions between the agencies, Congress, and the courts are primarily two-sided. Congress delegates, the agency executes, and the courts review. Legislative vetoes, by placing Congress and the courts in similar roles, make possible a three-sided interaction, with heightened potential for delay, disruption, and unforeseeable results.

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[316] *See* pp. 1375–76 *supra*.

[317] *See generally* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

[318] This could be done by requiring negotiations between the agency and Congress to be on the record or by attempting to prevent informal interaction between the agency and Congress during the rulemaking process. *See* pp. 1437–39 *infra*.

[319] 424 U.S. 1 (1976).

[320] *See* pp. 1407–08 *supra*.

[321] 408 F. Supp. 321 (D.D.C. 1976) (three-judge court), *prob. juris. noted*, 45 U.S.L.W. 3399 (U.S. Nov. 29, 1976) (No. 75–1605).

[322] *See* pp. 1400–01 *supra*.

D. Congressional Interference in Rulemaking

The congressional procedures required to bring a legislative veto resolution to the floor of either house are cumbersome and time-consuming. It is therefore in the interest of both the agency and its congressional oversight committees to avoid resorting to these procedures by resolving policy issues informally. As the case studies show, informal negotiations with compromise on both sides is characteristic of the review process under a legislative veto provision. These negotiations are a highly efficient review technique in the sense that they resolve policy differences between the agency and the committees relatively quickly, and without destroying the coherence of the resulting rule as an item veto might. Indeed, it is when negotiations fail and the formal machinery is invoked that policy impasse threatens.

Yet however efficient review by negotiation and compromise may be, it has one critical feature: it involves congressional committees and staff deeply in the rulemaking process. In a series of decisions, the federal courts have subjected similar ex parte influences in agency decisionmaking to increasing scrutiny.[324] The principles and reasoning of these decisions do not readily permit an exemption for congressional interference. The case law is still sparse, but developments indicate that judicial scrutiny once reserved for adjudication and informal executive actions may be extended to rulemaking.

Pillsbury Co. v. Federal Trade Commission[325] is the leading case on judicial scrutiny of congressional interference in adjudication. In open hearings, Congressmen importuned Commissioners and agency counsel to accept a certain interpretation of an antitrust law. Because the hearings focused on a case pending before the agency, the reviewing court felt that congressional influence was improper: "[W]hen . . . [a congressional] investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's *legislative* function, but rather in its *judicial* function."[326] The court feared that adjudicative proceedings held under overt and heavy congressional pressure might not be impartial.[327]

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[323] This possibility is noted in Nixon v. Administrator of General Services, 408 F. Supp. at 338 n.17.

[324] The underlying premises of these decisions are essentially those described at pp. 1375–78 *supra*.

[325] 354 F.2d 952 (5th Cir. 1966).

Until recently, any attempt to extend the reasoning of *Pillsbury* to the quasi-legislative rulemaking functions of an agency would have encountered a nearly insuperable barrier. For legislative processes have traditionally been immune from the type of due process scrutiny to which adjudication is subject.[328] Courts and commentators have lately begun to recognize, however, that a strict theoretical dichotomy between legislative and adjudicative functions is untenable.[329] The line between the two categories is indistinct: there are many agency actions which do not fit neatly into either category. And the justifications for disapproval of secret ex parte contacts in the adjudicative context — fairness, openness, reasoned decisionmaking based on a record, and ease and accuracy of judicial review — are now seen to apply in rulemaking proceedings as well.

Two decisions by the District of Columbia Circuit well illustrate the imprecision of the strict dichotomy between adjudicative and legislative functions in administrative proceedings. One of these is *D.C. Federation of Civic Associations v. Volpe* (*Three*

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[326] *Id.* at 964 (emphasis in original).

[327] *Pillsbury* must be understood, however, in light of the earlier doctrine that a commissioner's general, abstract views on legal issues — even if those views are strongly held or have been probed at a congressional hearing — do not constitute prejudice for which he should be disqualified. *See* FTC v. Cement Institute, 333 U.S. 683 (1948) (despite general preconceptions expressed at congressional hearing, commissioners remained qualified to decide whether particular respondent had engaged in prohibited conduct as long as their minds were open on that issue).

[328] *See* Nathanson, *supra* note 25, at 724–27.

[329] *See id.*; Friendly, *supra* note 26, at 1309–10. The Supreme Court, however, citing the classic cases for the distinction, Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915), and Londoner v. Denver, 210 U.S. 373 (1908), has suggested that the due process clause remains unavailable in rulemaking:

> While the line dividing them may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

United States v. Florida East Coast Ry., 410 U.S. 224, 245 (1973).

Sisters Bridge),[330] which involved informal executive action. A Congressman had threatened to block appropriations for Washington's new subway system until the Secretary of Transportation approved the construction of Three Sisters Bridge across the Potomac River. Because the Congressman's pressure had introduced a factor not authorized by statute into the Secretary's decision, the reviewing court invalidated his approval. The court noted that, if the Secretary's action had been "purely legislative," it might have been allowed to stand despite a finding that "extraneous pressures" had been considered.[331] The action was not purely legislative, however, because Congress had already established the boundaries of the Secretary's discretion. Thus, the action "fell between [the] two conceptual extremes" and should have been based only on factors which Congress had intended to make relevant — a principle the court thought "elementary and beyond dispute." [332]

A second case in which strict categorization of administrative actions was disapproved was *Sangamon Valley Television Corp. v. United States*.[333] An order of the Federal Communications Commission changing the allocation of VHF and UHF television channels was set aside because of secret ex parte contacts and minor favors granted Commissioners by interested parties. The Commission insisted that the order had been based on a rulemaking proceeding and that therefore the ex parte contacts should be ignored. The court responded that "whatever the proceeding may be called," if it involves "the resolution of conflicting private claims to a valuable privilege . . . basic fairness requires [that it] be carried on in the open." [334] The court implied that it could scrutinize undisclosed ex parte contacts on constitutional grounds where the interests at stake in a rulemaking proceeding resemble those normally dealt with in adjudication.[335]

The trend toward careful scrutiny of influences surrounding nonadjudicative actions that began in *Sangamon* and *Three Sisters Bridge* has been continued and elaborated by the same court in the recent case of *Home Box Office, Inc. v. FCC*.[336] In that case the FCC's rules for pay television were set aside, in part because members of the FCC had been party to repeated off-the-record contacts by both private interests and Congressmen.[337] The FCC admitted that ex parte activity was often present in its rulemaking proceedings. Although the agency attempted to allocate time for oral argument fairly among competing interests, arguments often continued ex parte, with compromise positions and the "real facts" reserved for the private sessions.[338] The court disapproved these off-the-record sessions on several grounds. First, it noted that if actual positions were not revealed in public comment but only in private discussions, the public procedures required by statute and the agency's own rules would be reduced to a sham. Second, the court observed that a complete administrative record is necessary for a reviewing court to test an agency's decision for arbitrariness or inconsistency with statutory authority. Since such tests are impossible when the agency's record does not contain "relevant information that has been presented to it," the agency is not entitled to the usual presumption that its action is proper.[339] Third, the inability of opposing parties to respond to secret presentations deprives the agency of the benefit of the "adversarial discussion" which is a primary purpose of statutory notice-and-comment procedures.[340] Finally, the court observed that secrecy in communications with the agency is inconsistent with "fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law." [341] Thus, although a constitutional ground was not necessary for the decision, the court asserted that one was available.[342]

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[330] 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

[331] *Id.* at 1247.

[332] *Id.*

[333] 269 F.2d 221 (D.C. Cir. 1959).

[334] *Id.* at 224.

[335] The precise basis of the court's decision in *Sangamon* is uncertain because of its alternative holding that the ex parte contacts violated the agency's own rules. *Id.* at 224–25.

[336] No. 75–1280 (D.C. Cir. March 25, 1977), *petition for cert. filed*, 45 U.S.L.W. 3808 (U.S. June 4, 1977) (No. 76–1724).

Nowhere in its opinion did the *Home Box Office* court attempt to distinguish between the ex parte contacts made by private interests and those made by Congressmen. Even in prescribing ground rules for future presentations to the agency, the court made no exception for members of Congress.[343] It would have been hard pressed to justify such an exception, for its opinion was based on the fact that the substance of unrecorded ex parte contacts is unavailable to both opposing parties and the reviewing court — and this is true regardless of the source of the contacts or the status of the parties making them. Moreover, both *Pillsbury* and *Three Sisters Bridge* make clear that Congressmen have no special license to interfere with agency decisionmaking. Thus, both the principles and the reasoning of *Home Box Office* seem to apply to ex parte contacts by members and subunits of Congress whenever those contacts are off the record.

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[337] There had been a series of meetings between the Commissioners and private interests, from which the public intervenors had been conspicuously absent. *See* slip op. at 87–88. In addition, broadcasters had approached "key members of Congress," who had pressured the FCC to maintain its restrictions on pay television's access to movies. *Id.* at 85 n.109, 86 n.112. Against a background of longstanding congressional pressure on behalf of broadcasting interests to restrict pay television, *see* Robinson, *supra* note 1, at 955 n.24; pp. 1420–21 *supra*, the Congressmen made it known in "no uncertain terms" that they opposed important policymaking by the FCC without congressional guidance. Home Box Office, Inc. v. FCC, No. 75–1280, slip op. at 86 n.112 (D.C. Cir. March 25, 1977).

[338] *Id.* at 88 n.117 (quoting FCC Mimeo No. 21343, at 4 (April 30, 1970)).

[339] Slip op. at 90–91.

[340] *Id.* at 91–92.

[341] *Id.* at 94.

[342] *But see* note 329 *supra*.

[343] As a prospective remedy, the court ordered that once a notice of proposed rulemaking issues, agency members involved in the decision must refuse to engage

Read together, these cases suggest growing judicial disapproval of informal congressional pressure on an agency during rulemaking. There is no reason why this disapproval should not extend to off-the-record negotiations between Congress and an agency over the substance of a proposed rule. Since most of the decisions condemning congressional interference rest primarily on statutory grounds, Congress might be able to remove the objections by making congressional displeasure a relevant and authorized ground for an agency's decision. Indeed, statutes implementing legislative vetoes could authorize negotiation expressly. This, however, may only succeed in forcing courts to explicitly constitutional grounds in order to disapprove improper influence in the administrative decisionmaking process. In any case, the statutory basis for disapproval of informal contacts — ease of judicial review, fairness to interested parties, and reasoned decisionmaking based exclusively on a record — is solidly grounded in policy. These policies, relied on by the court in *Home Box Office*, are central to the scheme of administrative law developed over decades. Even if Congress has the constitutional power, it should think twice before undermining them in order to implement a legislative veto.

E. Modifications and an Alternative

Traditional devices for congressional oversight of agency action have not furnished a means for systematic review of agency rulemaking. The legislative veto is designed to fill that need, and the case studies reveal that it has significant impact on agency rules, at least for programs in which Congress has an active interest. The case studies also reveal, however, serious problems in current practice under the veto procedure, principally in its fairness to interested parties, its consistency with effective judi-

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in private discussions until a final rule is promulgated. Should an ex parte contact occur, the document or a summary of an oral presentation must be placed in the public file for comment. Home Box Office, Inc. v. FCC, No. 75-1280, slip op. at 97-98 (D.C. Cir. March 25, 1977).

cial review, its furtherance of broad political accountability, and its overall impact on effective policymaking in Congress and the agencies. Despite lingering theoretical doubts that due process applies to rulemaking, the courts are likely to insist that any negotiations be carried on in the open, and they should do so. Policies central to the function of rulemaking in administrative law, which we have pointed out above, demand no less. Moreover, it seems a small intrusion on the flexibility and efficiency of negotiations to require them to be in open session and transcribed as part of the rulemaking record.

Secrecy, however, is not the only problem with the legislative veto as it is currently used in practice. The congressional review process adds a second stage to rulemaking, one in which not all interested persons now participate, and in which not all interests receive equal attention. Thus there is a problem of substantive as well as procedural fairness to those affected by a rule, deriving from the narrow political accountability implicit in a committee-dominated review system. Opening the negotiations to public scrutiny and placing them on the record might lead to broader accountability than is present now, by attracting more attention in Congress and increasing pressure on the committees from a wider range of private interests. This alternative, however, would not eliminate the effects of pressure on the committees by those interest groups most affected by a rule and best organized — typically the regulated industries. The capture of agencies by their regulated constituency to the disadvantage of the general public is presently reinforced by pressure on the agencies through congressional committees having members sympathetic to that constituency. The informal negotiation process surrounding legislative veto provisions seems likely to exacerbate this problem, even if it is required to be open.

In essence, the problem of equal access to the agency is a political one. It exists under the present system of administration and may inhere in the quasi-legislative nature of administrative rulemaking. Nevertheless, the special advantages which financial resources or influence give certain private interests are discordant with the basic theme of democratic government — especially if those interests are the very ones to be regulated. One of the fundamental principles of American political democracy is the negation of faction. Congress' broad constituency, encompassing virtually all regional and special interest groups, is expected to average out the demands of the various factions to produce a fair result.[344] To the extent that legislative veto authority allows special interests to achieve their ends by pressuring administrative agencies through congressional committees, such authority works to promote, rather than negate, faction.

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[344] *See* Watson, *supra* note 6, at 1032–43.

Perhaps agency-committee negotiations should be opened not only to public scrutiny but to public participation as well. However, such a change would not remedy unequal financial ability to participate, and the efficiency of present negotiations would be lost as they became multilateral. Ultimately, open negotiations in which the public participates would tend merely to duplicate notice-and-comment proceedings. In any case, it is unlikely that Congress would assent to such drastic changes in the ground rules of review.

An alternative response to these problems of substantive fairness would be to forbid negotiations between congressional committees and the agencies, while retaining veto authority. To keep a proper distance from the executive resolution of delegated policymaking, Congress could abjure bargaining over the substance of proposed rules, awaiting their arrival in final form. It would then rely on formal veto resolutions to void rules objectionable to either house as a whole. Since negotiations involve the members of Congress rather deeply in the essentially executive function of implementing statutes, such a restriction would have a constitutional underpinning in the separation of powers.[345] Such an arrangement, however, could have serious disadvantages. By eliminating the chief current technique for reaching policy accommodation, it might increase the probability of impasse between agency and Congress. Moreover, it would fail to reduce the veto's present disincentive to affirmative resolution of policy in Congress by legislation. Finally, it would relegate the legislative veto to the cumbersome and inefficient congressional machinery which gave rise to negotiations in the first place.

Since the disadvantages of the legislative veto inhere in its very nature, no combination of ameliorating techniques can eliminate them all. Congress should abandon it as a device for the oversight of agency rulemaking. There are other means by which Congress can exercise its oversight responsibility effectively without exceeding the proper bounds of its authority. Informal consultation between agency staff and congressional committee members or staff is certainly appropriate to inform Congress of agency action and to initiate a dialogue on policy; the problem is one of limits. Existing procedures allow congressional participation in rulemaking to occur in a perfectly appropriate fashion. The notice-and-comment period preceding formulation of a final rule provides an opportunity for any member of Congress, any staff member, or even a committee or a house as a whole to state its views on the legality or wisdom of a proposed agency rule. While such presentations by Congress before an agency may seem anomalous in light of the agency's ostensibly subordinate role, they have occurred in the past,[346] and there is no reason that they ought not to continue. Congressional views can be made part of the rulemaking record through the kind of written submission typical of notice-and-comment rulemaking, or by open congressional testimony at an agency's public hearing.

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[345] *Id.* at 995.

Perhaps Congress should alter some agency procedures to facilitate this kind of congressional activity. For example, new requirements for more elaborate explanations of rules proposed by the Federal Trade Commission may better alert congressional staff to issues of importance to the members.[347] If Congress makes open submissions within established boundaries of fair procedures for agency rulemaking, neither its expertise nor its political views will be lost. It seems unlikely that an agency would fail to respond in its reasons for a final rule to an explicit and reasoned congressional submission.[348] The courts could then decide whether the agency's resolution of the problem is within existing parameters of agency discretion. This arrangement would have the prime virtue of encouraging policy dialogue between Congress and the agencies consistently with the fundamental responsibilities implicit in a scheme of separate but interdependent powers.

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[346] *See, e.g.*, H. FRIENDLY, *supra* note 1, at 168 n.85.

[347] *See* 15 U.S.C. § 57a (Supp. V 1975). Congressional staff do not presently monitor the Federal Register systematically for new rules. *See* 2 STUDY ON FEDERAL REGULATION, *supra* note 35, at 66–67.

[348] *See, e.g.*, p. 1407 *supra*.

REPORT IN SUPPORT OF RECOMMENDATION 77-2

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JUDICIAL REVIEW OF CUSTOMS SERVICE ACTIONS

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This article is based on a report prepared for the Administrative Conference of the United States in connection with its study of judicial review of actions taken by the U.S. Customs Service. The recommendations herein were adopted in substantially identical form by the Administrative Conference at its September 19, 1977, plenary session. The article examines the present availability and scope of review of administrative decisions of the U.S. Customs Service. The author analyzes the overall operation of the Customs Service, procedures for internal review of Customs decisions and for assessment of penalties and other sanctions, and the distribution of jurisdiction to review Customs decisions between the U.S. Customs Court and the U.S. district courts. His conclusion offers extensive recommendations for the reform of the existing system, addressing such matters as jurisdiction, standing, burden of proof, and assessment of penalties.

INTRODUCTION

This article analyzes the adequacy of judicial review of U.S. Customs Service actions. Its principal focus is on the role of the U.S. Customs Court and the federal district courts in overseeing and controlling Customs Service actions; its underlying theme is the manner in which laws relating to imports are administered and applied.

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Some of the information in this article was obtained from interviews with customs attorneys, importers and brokers; many persons made helpful comments on an earlier draft of the report. Leonard Lehman, the Assistant Commissioner of Customs for Regulations and Rulings, was especially helpful. I received valuable research assistance from Teresa Bulman, a Georgetown Law Center student, who worked on the staff of the Administrative Conference in the summer of 1976, and from Stuart Goldberg, a third year student at Ohio State University College of Law. A number of persons gave valuable advice concerning the study and recommendations, notably David B. H. Martin, Research Director of the Administrative Conference, William H. Allen, Chairman of the Conference's Committee on Judicial Review, and Jeffrey S. Lubbers, a staff attorney at the Administrative Conference.

The U.S. Customs Service (Customs) is organized within the Treasury Department to administer and enforce a variety of statutes regulating U.S. imports and exports. Its tasks include: processing incoming travellers, vehicles, merchandise, and mail; collecting import duties and taxes; ensuring that prohibited merchandise is not brought into the country; preventing fraud; investigating alleged unfair import competition; and regulating trade and shipping in many other ways. In all these tasks, Customs makes decisions and exercises discretionary powers affecting many persons, under circumstances in which disputed issues of fact, law, and policy are likely to arise.

Two courts share responsibility for reviewing Customs action. The Customs Court, a nine-judge constitutional[1] tribunal located in New York City, is the exclusive forum for review of many administrative actions of Customs, but deals only with disputes arising under trade laws.[2] Other Customs actions are subject to review exclusively in federal district courts.[3]

Because analysis of the role of judicial review requires an understanding of the administrative process subject to review, this article begins with an overview of Customs Service operations. Recommendations concerning changes in the administrative procedures of the Customs Service are, however, beyond the scope of this article.

While this article focuses on recommendations concerning judicial review of Customs Service actions, there is no assumption implicit that improved judicial review would be a panacea for all Customs' ills. Indeed, reforms in the administrative process at Customs may be far more important to effective and fair administration of the law. The recommendations herein would open the administrative process to important judicially-mandated reforms, but in the final analysis judicial review must remain the ultimate, and not the principal, source of control of administrative action. Reforms in the process for judicial review are therefore only one part of an effective reform of the administration of customs laws.

Rather than surveying all Customs procedures, this article will focus on the procedures used in three representative areas: (1) those used to assess and collect import duties and taxes[4] on commercial importations; (2) those used to insure that imported merchandise meets safety and other regulatory standards; and (3) those used to assess and collect civil penalties, especially penalties under section 592 of the Tariff Act of 1930.[5] These subjects are the most important of the tasks assigned to Customs: they affect the largest number of people, consume the greatest amount of resources, and embody the most significant fact-finding and regulatory functions.[6]

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[1] The Customs Court is referred to as a "constitutional" tribunal because Congress has designated the Customs Court as a court established under Article III of the Constitution. 28 U.S.C. § 251 (1970).

[2] Decisions of the Customs Court are reviewed by the Court of Customs and Patent Appeals, 28 U.S.C. § 1541 (1970), whose decisions are subject to review upon *certiorari* by the Supreme Court, 28 U.S.C. § 1256 (1970).

[3] *See* text accompanying notes 180–198 *infra*.

Overview: The Nature of the Customs Process

Although the Customs Service was the first agency established by Congress,[7] customs administration is one of the least visible and least understood government functions. Few Americans have had any exposure to the customs process beyond, perhaps, a brief contact at the passport gate. Moreover, there is little published description of customs administration, congressional oversight has been sporadic, and, until recently,[8] the field has been left virtually untouched by scholars. On the whole, there are few who understand customs administration beyond those who are regularly involved in the process—Customs personnel, importers, and a relatively small number of customs brokers and lawyers specializing in customs matters. The system has been, and, to a large extent, still is, an insulated area, ingrown and relatively unaffected by developments in other fields.

Customs implements—and at times formulates—an important part of the national public policy concerning international trade, our economic system, and public health and safety. By collecting import duties and taxes, by insuring that imported goods comply with regulatory standards, and by administering laws against "unfair" import competition, Customs has a direct impact on the price and availability of imported merchandise, on the safety and quality of imported products, and on the nature of import competition faced by U.S. firms and workers.

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[4] Taxes collected by Customs on behalf of the Internal Revenue Service include excise taxes, 26 U.S.C. §§ 4061–4227 (1970 & Supp. V 1975) and tobacco taxes, 26 U.S.C. §§ 5701–5763, 251 (1970 & Supp. V 1975). *See generally* Office of the Chief Counsel, U.S. Customs Service, U.S. Dep't of the Treasury, Laws and Regulations Enforced or Administered by the United States Customs Service 26–1 (Apr. 1975).

[5] 19 U.S.C. § 1592 (1970).

[6] This Article does not consider judicial review of actions taken under the Antidumping Act of 1921, 19 U.S.C. §§ 160–172 (Supp. V 1975) or the Countervailing Duty Act, 19 U.S.C. § 1303 (Supp. V 1975), both of which are topics of great current concern.

[7] Act of July 31, 1789, ch. 5, 1 Stat. 29 (repealed 1890).

[8] *See* E. Rossides, U.S. Customs, Tariffs and Trade 71–193, 405–420 (1977); R. Sturm, A Manual of Customs Law (1974). A study prepared for the Attorney General's Committee on Administrative Procedure describes procedures used by the Customs Service but is somewhat dated. *See* 2 The Attorney General's Comm. on Administrative Procedure, U.S. Dep't of Justice, Monograph No. 27, Administration of the Customs Laws (1940).

Moreover, the importance of the policies Customs implements has paralleled the rapid expansion of international trade over the last two decades. Customs' workload has increased rapidly[9] in both volume and significance as international trade has become a major source of competitive stimulus—and thus potential injury—to U.S. businesses. As a result, the question of how Customs operates has assumed an increasingly greater importance.

The Customs Service traditionally has not been viewed as a regulatory or administrative agency, and, until recently, has been virtually untouched by the developments in administrative procedure of the past 50 years. Indeed, many Customs procedures descend from, or reflect, practices developed in the last century. Its operations invariably lack the procedural formalities often observed by other regulatory agencies. Customs does not resolve disputes through hearings on the record before an impartial decisionmaker, has no administrative law judges to take testimony under oath, and does not allow formal rebuttal of evidence relied upon in making decisions.[10] Instead, decisions may be reached without any articulated rationale, often on the basis of informal discussions between affected persons and Customs personnel, and sometimes on the basis of information which is not revealed to those adversely affected by the decision.

Some of the procedures Customs uses may be required by the volume of work the Service performs. For example, Customs must process every importation of merchandise, which in fiscal year 1976 amounted to more than 3 million individual import transactions.[11] In order to make the administration of this and other functions workable, informality and simplicity may be necessary, and discretionary authority of Customs personnel may be unavoidable.

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[9] *Customs Modernization Act and Section 592 of the Tariff Act of 1930: Hearings on H.R. 9220 Before the Subcomm. on Trade of the House Comm. on Ways and Means,*94th Cong., 2d Sess. 37–99 (1976) (testimony of David R. Macdonald)[hereinafter cited as *Modernization Act Hearings*]. Customs estimates that since 1950 entries of merchandise have grown 336 percent, entries of vehicles have grown 236 percent, and entries of persons have grown by 199 percent. *Id.* at 40.

[10] The single exception arises in connection with the revocation or suspension of the licenses of customs brokers, for which formal administrative hearings are provided. *See* note 17 *infra*.

On the other hand, many of the procedures Customs uses today derive from those established when customs duties were the principal source of government revenue.[12] Procedures at that time were structured to protect the government's ability to collect revenue, with maximum emphasis on efficiency, simplicity, and collection, and minimum emphasis on procedural fairness or availability of review.

Now Customs' revenue-raising function is only incidental; its primary function is to implement statutes regulating international trade. Congress sets import duties and authorizes the President to negotiate changes in duties, not with a view toward the revenue they will produce, but on the basis of the impact that such duties are likely to have on domestic markets and industries. Likewise, when Customs keeps merchandise out of the country, ensures that imports meet product standards, or interprets and applies statutes governing competitive practices, it exercises a regulatory rather than a revenue-raising function. Thus, the basic function of Customs has shifted, and many of the administrative procedures that once may have been justified to protect the collection of revenue are no longer appropriate for advancing the public interest that Customs now represents.

Because the significance of Customs' role as a regulatory agency has grown, there is increasing interest in how it performs its functions. The Subcommittee on Trade of the House Committee on Ways and Means has formed a special task force to provide oversight of Customs administration[13] and has held two sessions of hearings concerning customs modernization and the reform of monetary penalty provisions.[14] A bill approved by Ways and Means would modernize some of the laws relating to imports.[15] In addition, the Customs Section of the Civil Division of the U.S. Department of Justice is studying the jurisdiction and powers of the Customs Court over actions of the Customs Service and other agencies.

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[11] U.S. Customs Service, U.S. Dep't of the Treasury, Prologue '76 30 (1976).

[12] In fact, for many decades after the establishment of the federal government customs revenue constituted almost the entire source of federal income. Average annual customs receipts amounted to approximately 92.3 percent of the average annual federal revenue between 1800 and 1820, and constituted over half of total U.S. revenue until the 1920's. *See generally* W. Futrell, The History of American Customs Jurisprudence 29–56 (1941). Today, customs revenue constitutes less than 2 percent of all revenue collected. *See* U.S. Bureau of the Census, U.S. Dep't of Commerce, Historical Statistics of the United States, Colonial Times to 1970 1121 (bicentennial ed., pt. 2, 1975).

[13] Subcomm. on Trade of the House Comm. on Ways and Means, Trade Press Release No. 6 (Mar. 23, 1977).

THE ADMINISTRATIVE PROCESS AT THE CUSTOMS SERVICE

Customs Organization

Most of the work performed by the Customs Service is carried out by personnel at 3,000 stations within the 300 ports of entry designated by Congress and the Secetary of the Treasury as locations through which imported merchandise may enter the country.[16] Customs employees at larger ports like New York City often have specialized responsibilities. Customs inspectors are responsible for examining imported merchandise and the vehicles, vessels, and planes used to transport that merchandise. Import specialists ascertain the duties due on particular types of merchandise; for example, an import specialist in consumer electronic products determines the duties due on all commercial importations of televisions, radios, phonographs, and similar merchandise. In this way, import specialists develop familiarity with regular importers, their merchandise, and how the merchandise should be treated under the various laws and regulations enforced by the Service. Ports in a particular geographic area are encompassed within a customs district under the supervision of a district director, who is generally the first to review disputed decisions made by personnel at the ports. There are forty-eight customs districts, each encompassed within one of nine customs regions under the direction of a regional commissioner of Customs.

At the apex of the organizational pyramid is the Customs Service headquarters in Washington, D.C., which is headed by the Commissioner of Customs and divided into seven operating offices, each headed by an assistant commissioner. Substantive legal questions arising from Customs work are reviewed and generally decided by the Office of Regulations and Rulings, which also promulgates Customs Regulations and administrative rulings and makes other substantive determinations. The Office of Operations oversees day-to-day operations at the ports by establishing inspection and processing procedures and training personnel. The Office of Investigations conducts investigations and gathers information needed to assess duties and carry out Customs enforcement functions. Two other offices, Administration and Internal Affairs, handle hiring, budgeting, and accounting matters and internal investigations and control. The Office of Enforcement Support was established in 1974 to aid in the prevention of fraud and smuggling. It is responsible for developing new technology and systems to support Customs investigation and interdiction efforts. A seventh office, the Office of the Chief Counsel, provides legal advice to Customs organizations. It serves as liaison with the Customs Section of the Civil Division of the Department of Justice, which litigates cases before the Customs Court, and with U.S. attorneys, who litigate Customs cases before district courts.

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[14] *See Modernization Act Hearings, supra* note 9; *Customs Procedural Reform: Hearings on H.R. 8149 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Procedural Reform Hearings*].

[15] H.R. 8149, 95th Cong., 1st Sess. (1977).

[16] Within each port there are usually numerous stations where Customs personnel process people or goods. There are approximately 160 stations on the U.S.-Canadian border, some manned by only one person. Temporary Customs stations also may be established to process nonrecurring imports such as those arising from lumbering operations near the border. *See generally* 19 C.F.R. § 101.1, 101.3, 101.5 (1977).

Merchandise Processing

1. *Overview*

Processing of imported merchandise by Customs involves two initial steps: examination and release of the merchandise, and entry. If the importer has obtained a special permit for immediate delivery, merchandise is examined and released by Customs under bond as soon as it is imported.[17] Within 10 days after the merchandise is released, the importer or his agent must complete the requirements for entry—submission (and acceptance by Customs) of required documents and payment of duties and import taxes estimated to be due on the merchandise. If the importer has not obtained a special permit for immediate delivery, the steps are taken in reverse order: the entry procedures are completed and then the merchandise is examined and released.

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[17] Many importers hire a customhouse broker as their agent to clear merchandise through the customs process. Because of the important role they play, brokers are themselves the subject of regulatory controls administered by Customs: Customs determines the qualifications and responsibilities of brokers, administers examinations, issues licenses (and has authority to revoke or suspend licenses), and determines what functions may be undertaken by nonlicensed brokers or agents. *See* 19 U.S.C. § 1641 (1970); 19 C.F.R. § 111 (1977). Revocation or suspension of a broker's license follows a formal hearing before the district director of Customs under procedures consistent with § 554 (adjudications), § 557 (decisions), and § 558 (revocation of licenses) of the Administrative Procedure Act. 5 U.S.C. §§ 554, 557, 558. *See* 19 C.F.R. § 111.62–.74 (1976). The decision of the district director is subject to review by the Secretary of the Treasury whose decision is reviewable by a court of

After these two steps have been completed, the import specialist "liquidates" the entry by determining the amount of duties and taxes actually due on the merchandise,[18] and either sends the importer a bill for additional charges owed or remits any overpayment. Thereafter, the importer has 90 days to protest the liquidation by filing a written statement. If after informal administrative reconsideration, a protest is denied by Customs, the importer may file a summons in the Customs Court challenging the decision.

2. *Immediate Delivery Privileges*

Over 80 percent of all import transactions are processed under special permits for immediate delivery.[19] Such a permit allows the importer to take delivery of the merchandise as soon as it is examined and released by Customs, before he tenders the entry documents and estimated duties to Customs. The importer must then complete the entry procedures within 10 days.[20] Such procedures benefit the Customs Service, importers, and brokers, because they allow the physical inspection of merchandise to proceed independent of the documentary inspection (entry). For Customs, this reduces congestion on the docks and alleviates pressures to expedite review of entry documents; for importers and brokers, it allows merchandise to be received quickly.

Special permits for immediate delivery, issued to importers and brokers by district directors, may cover a particular shipment or an entire class of merchandise to be imported for up to one year.[21] The standards for issuing them are imprecise. Permits may be issued:

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appeals. 19 U.S.C. § 1641(b) (1970). *See, e.g.*, Twigger v. Schultz, 484 F.2d 856 (3d Cir. 1973).

[18] Liquidation is defined in the Customs regulations as the "final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1 (1977).

[19] Immediate delivery privileges are authorized by 19 U.S.C. § 1448(b) (1970) and administered under regulations in 19 C.F.R. § 142 (1977).

[20] 19 C.F.R. § 142.11 (1977). If the merchandise is subject to a quota the time period within which entry must be completed may be shorter. *Id*.

[21] *Id*. § 142.3.

> for perishable merchandise and any other merchandise for which delivery can be permitted with safety to the revenue, when immediate release of such merchandise is necessary to avoid unusual loss or inconvenience to the importer or to the carrier bringing the merchandise to the port, or more effectively to utilize Customs manpower or to eliminate or reduce congestion.[22]

Although this regulation seems to put the burden on the applicant to show that the conditions for granting the permit exist, in practice permits are issued routinely unless the district director believes that issuance would impair the safety of the revenue.[23] There are no procedures for challenging a refusal to issue a permit or for review of such a decision.

Special permits may be discontinued or suspended by a district director. Discontinuance may result if an importer "has repeatedly failed to make timely entry without sufficient justification" or has "not taken prompt action to settle a claim for liquidated damages" imposed for failing to make timely entry.[24] No procedures govern the discontinuance of special permits. Suspension may result if the importer "is substantially or habitually delinquent [in paying] Customs bills."[25] Suspension is governed by the following procedures: the importer is given notice by a customs region that he is "substantially and habitually delinquent," and that his permit has been suspended in that region. Thereafter, if the importer pays all bills on which he is delinquent, the suspension is lifted; if he does not, his immediate delivery privileges are suspended in every other customs region. There are no procedures by which a suspension or discontinuance may be appealed or otherwise reviewed within the Customs Service.

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[22] *Id.* § 142.1.

[23] The regulations are imprecise because Congress has never sanctioned the use of immediate delivery privileges on a wide scale. When the statute authorizing immediate delivery was passed it was the practice first to review and accept the entry documents and estimated duties, and then to inspect the merchandise. Permits for immediate delivery were to be "special" for "perishable articles and other articles, the immediate delivery of which is necessary." 19 U.S.C. § 1448(b) (1970). Since importation has increased so greatly, these permits are now the rule rather than the exception.

[24] 19 C.F.R. § 142.7(a) (1977). If the importer or broker does not make timely entry he has breached one of the provisions of the bond covering the importation, and Customs may assert a claim for the liquidated damages specified in the bond. The "action to settle a claim" referred to in the regulation is either payment of the claim or a petition seeking relief from the claim. *See* text accompanying note 109 *infra*. Such action is considered "prompt" if it is taken within the time specified in the claim.

[25] 19 C.F.R. § 142.7(b) (1977). There is no regulation defining the term "substantially or habitually delinquent."

The standards under which permits can be discontinued or suspended are imprecise. Because they are applied at the district or region level, there is a danger of inconsistency. For example, there is controversy concerning when entry is "timely."[26] To be timely, the entry procedures must be completed within 10 days after merchandise is released; completion requires acceptance of the entry documentation by Customs.[27] If an importer submits entry documents on the first day after release of the merchandise but the documents are returned to him by Customs for correction on the ninth day, it may be impossible to resubmit them for acceptance by the tenth day. Some district directors apparently treat this as untimely entry, while others consider entry to be timely as long as the corrected documents are resubmitted within a reasonable period. Issues such as these are currently being litigated in a district court in Illinois.[28]

3. *Examination and Release*

Control over imported merchandise from the moment the merchandise arrives at a port is an important enforcement power giving Customs the opportunity to examine the merchandise and withhold its release if it does not comply with regulatory standards. Examination of merchandise yields information used in assessing duties, reveals whether the entry documents accurately describe the quantity and quality of merchandise, insures that each product is properly marked to show the country of origin, and permits assessment of compliance with other regulatory standards. Because of the volume of imports and inadequate staffing, however, thorough inspection is often not possible. Only rarely do Customs inspectors even count the items of merchandise to insure that the correct quantity has been declared.[29]

In some cases, specialized examination may be required if information is needed to determine duties or if the merchandise is subject to regulatory controls. For example, imported sugar is subject to a "polariscopic test," flat glass must be weighed, and imported petroleum must be tested to determine its API gravity at 60 degrees Fahrenheit. Customs has established procedures for determining such facts, often relying upon analysis by its own laboratories or by independent testing agencies licensed for this purpose.[30] More thorough and particularized inspection may be necessary to determine whether merchandise complies with other regulatory statutes. Imported books and movies may be read or screened to determine if they are "obscene;"[31] knives may be examined to assure they are not prohibited "switchblade knives."[32].

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[26] The issue is important because untimely entry may lead to discontinuance of immediate delivery privileges and to claims for liquidated damages under a bond. *See* note 22 *supra*.

[27] *See* text accompanying notes 34–35 *infra*.

[28] Gallagher and Ascher Co. v. Simon, No. 76–C–3499 (N.D. Ill., filed Oct. 12, 1976) (suit to enjoin district director from suspending permit).

[29] The process of examination and release normally takes very little time; it is generally completed within a day or two after the merchandise arrives and is sometimes completed within a matter of hours.

If the regulatory standards applicable to a particular product are interpreted and applied by another agency, Customs will normally coordinate its activities with the agency involved. Such inter-agency action takes many forms and involves agencies as diverse as the Department of Agriculture, the Department of Health, Education and Welfare and the Consumer Product Safety Commission.

After Customs obtains the information it needs and determines that merchandise should be allowed into the country, the shipment is released to the importer. However, Customs retains control over the merchandise because the importer's bond covering it guarantees that the goods will be redelivered to Customs upon demand. A liquidated damage amount, up to the value of the bond, is recoverable by Customs if the merchandise is not so returned. Customs' power to reacquire physical control over the merchandise—under threat of liquidated penalties—is an important enforcement tool.[33]

4. *Entry*

Through the entry procedure Customs ensures that required documents are adequately and accurately completed, determines whether the merchandise is admissible to the country, and collects estimated duties and taxes on the merchandise.[34] To complete entry, the importer (or his agent) submits entry papers to the local customhouse for approval.[35] If the documents are found to be in order, they are reviewed by the import specialist, who determines whether the declaration of estimated duties and taxes is accurate. He will refuse to accept the entry papers if the importer incorrectly calculated estimated duties or taxes or if other information is erroneous or missing. For example, if the import specialist believes that the classification the importer used to determine the rate of duty is incorrect, he may require estimated duties to be recalculated before he accepts the entry papers. The import specialist does not make a final decision concerning the amount of duties and taxes due; his function is to screen the entry to ensure that, given the information then available to him, the estimated duties and taxes appear to be calculated correctly.

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[30] For example, Customs has licensed "public gaugers" whose reports concerning the properties of imported petroleum products are accepted by Customs as accurate. *See* 19 C.F.R. § 151.43 (1977). Procedures governing the examination of sugar are contained in 19 C.F.R. § 151.21–.31 (1977). Those pertaining to flat glass are contained in 19 C.F.R. § 151.101 (1977).

[31] *See* note 83 *infra* and accompanying text.

[32] *See* 15 U.S.C. § 1241 (1970).

[33] Procedures invoked when Customs demands the redelivery of merchandise or attempts to collect liquidated penalties for failure to redeliver the merchandise upon demand are discussed in text accompanying notes 108–10 *infra*.

Importers usually do not contest the import specialist's calculation of estimated duties or taxes at this stage of the process, since there are no established procedures for doing so. Therefore, if the import specialist refuses to accept the entry papers, the importer corrects and resubmits them. At a later date, the importer may challenge such a determination and, if successful, receive a refund of overpaid duties and taxes.

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[34] The text here describes "consumption entries," which allow the importer to receive the merchandise as soon as it is inspected and released by Customs. Over 80 percent of all entries are of this type. If the importer does not want the merchandise immediately, or, in some instances, if the merchandise is to be remanufactured or exported, the importer may make a "warehouse entry." In that case, the merchandise is inspected and stored in a bonded warehouse, but estimated duties on the merchandise are not paid until the merchandise is withdrawn from the warehouse by the importer. *See* 19 C.F.R. § 144 (1977). For such purposes, Customs has established regulations for licensing and bonding warehouses. *Id.* § 19.1–.49.

Simplified entry procedures have been established for noncommercial importations. "Appraisement entry" is used for damaged merchandise, personal gifts, household effects, and certain other classes of merchandise, and may be authorized by the Commissioner of Customs in other instances. *See id.* § 143.11–.16. "Informal entries," which are made by most returning tourists, are used for shipments valued at less than $250, for household or personal effects or tools of trade entitled to free entry, for certain books imported by libraries, and for certain other types of merchandise. *See id.* § 143.21–.28.

[35] Entry papers include proof that the importer has the right to receive the goods (*e.g.*, a bill of lading); documents containing information needed to determine duties (a commercial invoice, a copy of the Special Customs Invoice, packing lists); in some instances, proof that the merchandise is admissible to the country (*e.g.*, a certificate required by another federal agency); and a document showing a declaration of duties and taxes (usually a Consumption Entry). Under some circumstances, the import specialist or the district director may waive the requirement that particular documents be submitted. *Id.* § 141.92.

5. *Customs Bonds*

Customs bonds provide a means by which Customs, without holding imported merchandise or resorting to a lengthy collection process, can ensure that the interests it is mandated to protect are protected. District directors approve bonds and determine the amount in which they must be filed.[36]

The three general bonds used most frequently with respect to imported merchandise are: (1) the general term bond; (2) the immediate delivery and consumption entry bond (term); and (3) the immediate delivery and consumption entry bond (single entry). Most importers maintain either a general term or an immediate delivery (term) bond. Customs brokers are not permitted to file a general term bond, and generally maintain a term immediate delivery bond. Under an immediate delivery and consumption entry bond, (either term or single entry),[37] an importer or broker promises, among other things: to complete entry within 10 days after release of the merchandise; to deposit estimated duties with the entry; to redeliver the merchandise to Customs upon demand; to pay duties which become due after the merchandise is liquidated; and to file additional documents requested by Customs.[38] A person filing a general term bond agrees to the same conditions, and may agree to several others concerning matters such as merchandise entered temporarily (as for repairs), transportation of merchandise in bond to another port for inspection, and warehouse entries.[39]

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[36] The district directors are to approve bonds "if satisfied that the amount is sufficient, the bond is in proper form and [a related form] has been properly completed." U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, CUSTOMS MANUAL CM-139 to -140, CM-140 (15th rev. Oct. 1976) [hereinafter cited as CUSTOMS MANUAL]. *See also* 19 C.F.R. § 113.15 (1977).

The general term bond is generally equal to 10 percent of duties and taxes which the importer paid in the immediately preceding year in that district or (if no such duties and taxes were paid) 10 percent of the amount of duties and taxes which the importer estimates he will incur in the coming year (rounded to the nearest one hundred thousand dollars). CUSTOMS MANUAL, *supra* at CM-140. If current charges against the bond threaten to be larger than the amount of the bond, the district director may require the importer, as a condition of continued importation, to deposit supplementary duties, or file a larger bond, a superseding bond, or a single entry bond covering each new importation. The amount of the immediate delivery and consumption entry bond is determined on the basis of the amount and frequency of the charges the district director believes will be incurred against the bond and the speed with which those charges are likely to be discharged by liquidation and the payment of duties. The single entry bond is equal to the value of the imported merchandise (as determined at the time of entry) plus the estimated duties and taxes on the merchandise.

[37] A term bond covers all importations within a single year. A single entry bond covers only a particular entry.

[38] Riders may be added to the bonds to cover special contingencies—for example, the deferred payment of Internal Revenue Service taxes. *See* CUSTOMS MANUAL, *supra* note 36, at CM-140.

There are no written procedures for challenges to, or review of, decisions the district director makes with respect to bonds. If an importer or broker believes that the amount of the bond or other bond requirements are incorrect, his only remedy is to seek a reversal of the decision from the regional director or Customs headquarters; however, reversals rarely occur.[40]

Ascertaining Duties and Taxes

Following entry and release of merchandise, Customs must liquidate the entry by determining whether the importer paid the correct duties and taxes at the time of entry. This article discusses some of the substantive issues involved in ascertaining import duties and taxes, and then describes the procedures leading to liquidation and subsequent judicial review.

1. *Substantive Issues*

The assessment of duties and taxes involves both factual and legal issues. First, the imported merchandise is classified into one of the more than 6,700 descriptive product categories in the Tariff Schedules established by Congress.[41] The Tariff Schedules show the rate of duty to be collected on products in each category, either a specific rate (*e.g.*, 10 cents a dozen), an *ad valorem* rate (*e.g.*, 10 percent of "value"), or a combination of both. Classification decisions are of crucial significance for the importer, because they establish the rate of duty to be paid.[42]

Customs must also appraise the merchandise by determining the value of the product under one of several standards established by Congress.[43] Because those standards are extremely complicated, appraisement determinations often involve complex statutory interpretation and intricate factual issues.[44]

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[39] *Id.*

[40] Procedures for enforcing the provisions of a bond are discussed at text accompanying notes 108–110, *infra*.

[41] Description of the principles used to classify merchandise are set out in E. ROSSIDES, U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, TARIFFS AND TRADE 95–120 (1977); Feller, *An Introduction to Tariff Classification*, 8 LAW & POL'Y INT'L BUS. 991 (1976), and R. STURM, A MANUAL OF CUSTOMS LAW 145–399 (1974).

[42] *See, e.g.*, Schmidt, Pritchard & Co. v. United States, 10 CUST. BULL. 35, 36 (1976). There the issue was whether certain wire rod coiling equipment should be classified as "metal working machine tools" taxable at 15 percent *ad valorem*, or as "machines for working metal, not otherwise provided for," taxable at 10 percent *ad valorem*.

[43] The standards of valuation are contained in 19 U.S.C. §§ 1401(a), 1402 (1970).

In addition to classification and appraisement, many aspects of duty assessment raise complex questions. For example, imported merchandise assembled in a foreign country from components fabricated in the United States is entitled to an allowance for the cost or value of the components, but only if the components were exported in a state ready for assembly without further fabrication, have not lost their physical identity, and have not been advanced in value or improved in condition abroad except through assembly.[45] Customs personnel regularly make similarly difficult determinations.[46]

2. *Procedures for Ascertaining Duties and Taxes*

a. *Liquidation*

The import specialist uses informal procedures to determine whether the estimated duties and taxes paid by the importer were correctly computed. The scope of his investigation depends on the product involved, the standards to be applied in determining value, the prior experience he or other specialists have had with similar products, and the extent to which he relies upon the information supplied by the importer on the entry documents. The import specialist's task, although complex, is facilitated in several ways.

The import specialist has no obligation to compile a record or verify information upon which he relies. Unless challenged, he need not demonstrate the accuracy of his decisions to any impartial decision-maker. Indeed, the import specialist need only "estimate" the value of the merchandise "by all reasonable ways and means,"[47] and even if ultimately challenged in the Customs Court, the decision is supported by a presumption that it is correct.[48]

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[44] *See generally,* SENATE COMM. ON FINANCE, 93D CONG., 1ST SESS., REPORT ON CUSTOMS VALUATION 61–81 (Comm. Print 1973).

[45] *See* Item 807.00 of the Tariff Schedules of the United States, 19 U.S.C. § 1202, sch. 8, pt. 1 subpt. B (1970). Similarly, Item 806.30 provides for reduced valuation for articles of metal manufactured in the United States, exported for further processing and then imported for still further processing. 19 U.S.C. § 1202, sch. 8, pt. 1, subpt. A (1970).

[46] *See, e.g.*, 19 U.S.C. § 1313 (1970) (drawbacks of duty paid on re-exported materials), 19 U.S.C. §§ 1506 and 1563 (1970) (allowances for abandoned or damaged property), 19 U.S.C. § 1558 (1970) (refunds for exported or destroyed merchandise); 26 U.S.C. §§ 4061–4227, 5701–5763 (1970)(import taxes imposed under the Internal Revenue Code).

[47] 19 U.S.C. § 1500(a) (1970).

[48] 28 U.S.C. § 2635(a) (1970).

The import specialist has a number of sources to guide his treatment of relevant issues. Substantive decisions of Customs in the form of notices, letters, and rulings are circulated to all ports through a format known as the Customs Information Exchange. Much of the information supplied to import specialists through the Exchange is not published or otherwise disseminated to the public unless it is voluntarily disclosed by an import specialist or released under a Freedom of Information Act request. The import specialist, either on his own or at the importer's request, may ask the Office of Regulations and Rulings to give advice on specific substantive issues that arise.[49] National import specialists in New York City act as Customs' repository and clearinghouse for data pertaining to individual products or individual markets, including records of how products have been dealt with at various ports, and can give guidance on the basis of such data.

For some appraisements, especially those involving the determination of foreign value or cost of production, the import specialist may gather additional information or verify that provided by the importer. All information supplied by the importer is subject to verification by Customs agents, who can obtain access to the records of the importer or his foreign supplier for such purposes.[50] In some instances, Customs will undertake a so-called "foreign investigation," having Customs agents overseas obtain information necessary for the ascertainment of duties.[51] Copies of reports resulting from such investigations are available to importers only through discovery procedures incident to a Customs Court proceeding.[52]

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[49] 19 C.F.R. § 177.11 (1977).

[50] 19 U.S.C. § 1509 (1970). If an importer denies Customs information which is pertinent to value or classification determinations, Customs can prohibit the relevant importation, withhold delivery of merchandise, and, if the denial continues for a year, sell the withheld merchandise at public auction. *Id.* § 1511 (1970). Customs also has authority to require importers to appear and testify under oath. *Id.* § 1509 (1970). Interestingly, Customs has no authority to compel those involved in importation to keep books and records relating to importations, a defect which would be remedied by H.R. 8194 and H.R. 8367, 95th Cong., 1st Sess. (1977).

[51] There are no published regulations governing the conduct of such investigations; they are informal and the report of the agent making the investigation is the only form of record. In most cases, importers who desire to do so are permitted to participate in investigations of their foreign suppliers. However, if the importer is not informed by the supplier, he may remain unaware of the investigation until the information gathered in the investigation is used to appraise his merchandise.

[52] Such reports are exempt from disclosure under the Freedom of Information Act. *See* 19 C.F.R. § 103.10(g) (1977).

If through such means the import specialist determines that the importer's estimated duties and taxes were correct, the merchandise is liquidated "as entered," and Customs procedures with respect to that importation generally are complete. Approximately 85 percent of all entries are liquidated in this manner.[53] If the import specialist determines that the estimated duties and taxes were too high, the merchandise is liquidated at the correct amount, and the excess payment refunded to the importer. If the estimated duties and taxes were too low, the merchandise is liquidated at the higher amount, and the importer is billed for the difference.[54]

As mentioned earlier, the standards to classify and value goods are complex and extremely difficult to apply, so disputes do arise between Customs and importers. Such disputes may be disposed of informally, either before or after liquidation.

If the importer believes that the estimated duties he paid were determined incorrectly, he might attempt to have disputed issues resolved through informal administrative procedures prior to liquidation. Typically, the importer would first speak to the import specialist who made the disputed decision. If the import specialist refused to change the decision, the issue might be raised with the import specialist's immediate supervisor, the district director, or the national import specialist in New York City. Alternatively, the importer might request that the import specialist seek a ruling from the Office of Regulations and Rulings in Washington under the internal advice procedure,[55] in which case that office may issue a letter ruling, settling the issue.

Should the importer decide to abandon the informal approach, the goods would be liquidated and the importer given the opportunity to seek further administrative review by protesting the liquidation, and ultimately to seek review in the Customs Court.

Even if the importer raises no issues prior to the liquidation, the import specialist may do so. He may ask the importer to correct clerical errors or make noncontroversial changes in the entry document or may issue a "notice of tentative liquidation" informing the importer of a tentative decision to require additional duties and giving the importer an opportunity to challenge the tentative determination. The importer then may discuss the matter with the import specialist and seek an informal resolution through the import specialist's superiors. Again, final liquidation is generally postponed until these informal procedures have run their course.[56]

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[53] Letter from Leonard Lehman, Assistant Commissioner of Customs for Regulations and Rulings, to author (Aug. 26, 1976) (on file with the Administrative Conference of the United States, Washington, D.C., and at office of Law and Policy in International Business).

[54] The liquidation actually is approved by the district director of the port involved, but rarely with more than *pro forma* review unless a disputed issue has already been brought to his attention. Decisions of the district director are often made by his staff under his supervision.

[55] *See* 19 C.F.R. § 177.11(b) (2) (1977)

The length of the liquidation process varies greatly. Many decisions are routine, based upon established precedent or information supplied by the importer. Because of the volume of work there are pressures to process entries quickly without raising controversy.[57] However, there is no time period within which liquidation must be completed. When disputes do arise, or when the determinations made by Customs are complex, liquidation often does not occur until long after the goods have been entered.

b. *Protests*

After liquidation is completed, the importer must pay any additional duties, but he then may seek review of contested issues by filing a protest—a written statement setting forth arguments and evidence to refute the determinations made in the liquidation.[58] The protest, which must be filed within 90 days of liquidation,[59] is an important procedural step, since protests control access to the Customs Court; no suit may be brought in the Customs Court until after a protest has been filed and denied by Customs.[60]

After receiving a protest, the import specialist reviews the issues raised and submits a memorandum to the district director outlining the facts and the basis of the liquidation. The district director, after considering the import specialist's report and the protest, may request further information and, although he is not required to do so, may give the importer an opportunity to discuss the issues informally. If uncertain of how to resolve the issues, he may seek advice either from the regional commissioner, the national import specialist in New York City, or the Office of Regulations and Rulings in Washington.

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[56] Notice of final liquidation is given by posting the notice on a customhouse bulletin board at the port of entry, not by mailing it to the importer. 19 C.F.R. § 159.9 (1977). If the importer does not receive a refund of duties or a bill for additional duties, he may never receive personal notice that liquidation has been completed.

[57] The 1200 import specialists collectively liquidated over three million formal entries in fiscal year 1975. U.S. Customs Service, U.S. Dep't of Treasury, Prologue '76 33 (1976).

[58] Liquidations that have not beeen protested within the prescribed period are final, although they may be corrected for clerical errors, mistakes of fact, or other inadvertance not amounting to an error in the construction of a law or, in certain circumstances, reliquidated on account of fraud. 19 U.S.C. §§ 1520(c), 1521 (1970).

[59] *Id.* § 1514(b)(2) (1970).

[60] Unless a request for accelerated disposition is filed, Customs has up to 2 years to review a protest. 19 U.S.C. § 1515 (1970). When a request for accelerated disposition is filed, the protest is deemed to be denied unless acted on within 30 days. 19 C.F.R. § 174.22 (1977).

In some instances a protesting party may seek review of the protest by higher authority than the district director. This is possible: if the challenged decision is allegedly inconsistent with a ruling of the Commissioner of Customs or with a decision in any district concerning the same or substantially similar merchandise; if the protest raises a question of law or fact not yet ruled on by the Commissioner of Customs or his designee or by the courts; if the protest, although subject to a prior ruling, raises facts or legal arguments not previously considered; or if the protesting party had previously applied for, but had been denied, internal advice under Customs internal advice procedures.[61]

A protesting party seeking such review files an application for further review with the district director. If the district director determines that the claim is valid, he allows the protest (*i.e.*, reverses the liquidation). If he believes the protest should be denied, he forwards the protest and application to the regional commissioner for his district, who determines at what level further review should take place.[62] If the protest involves a "strictly factual issue" or if it "clearly" should be allowed under a specific ruling from headquarters, the regional commissioner will decide the issue,[63] but any other issue will be forwarded to the Office of Regulations and Rulings for a decision.[64] If the protest is denied, the importer may seek Customs Court review of the issues raised by the protest.[65]

Regardless of who the ultimate decision-maker is, the procedures used by Customs in ruling on protests are informal. Neither evidence nor argument is preserved on a record, nor is there an impartial decision-maker. Decisions may be based on information which is not disclosed to the importer. Decisions need not be, and generally are not, supported by a written explanation, although in some cases the importer may receive a written or oral explanation. More often, the importer receives only a notice that the protest is granted or denied.

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[61] 19 C.F.R. § 174.23 (1977).

[62] U.S. CUSTOMS SERVICE, U.S. DEP'T OF TREASURY, FUNDAMENTALS OF DUTY ASSESSMENT 8-11 (2d rev. June 1973).

[63] *Id.*

[64] *Id.* The regulations in 19 C.F.R. § 174.26 (1977) articulate the division of reviewing authority between the regional commissioner and Customs Headquarters by listing the issues to be determined by Headquarters (the Office of Regulations and Rulings) and leaving other decisions to the regional commissioner.

[65] In fiscal year 1975, 57,012 protests were filed; 76 percent of these were denied by Customs, of which less than 1 percent were challenged in the Customs Court. Letter from Leonard Lehman, Assistant Commissioner of Customs for Regulations and Rulings, to author (Aug. 26, 1976) (on file with the Administrative Conference of the United States, Washington, D.C.).

Customs has up to two years in which to act on the protest. An importer may, however, apply for accelerated disposition of a protest at any time more than 90 days after the protest is filed, in which event the protest is deemed denied unless it is acted on within 30 days.[66] If the protest is denied, the importer may seek Customs Court review of the issues raised by the protest.

c. *Internal Audits*

The decision of the import specialist concerning classification and value generally is not reviewed unless the importer involved questions it. Procedures do exist, however, to identify and correct erroneous decisions that favor, and are thus not questioned by, the importer. There are at least two ways—one formal and one informal—in which erroneous decisions may be corrected.

Informally, incorrect determinations that favor an importer may be detected if Customs recognizes that inconsistent determinations concerning similar merchandise are being made at different ports. This may occur, for example, if the national import specialist in New York City recognizes such inconsistent treatment in the course of reviewing information concerning individual importations. There is no guarantee that inconsistencies will be detected in this way, and Customs apparently has no workable formal procedures for systematically reviewing the treatment given to imports at the various ports. The danger may exist that some importers will "shop" between ports until they find one which gives their merchandise favorable treatment. The Customs Information Exchange[67] is an attempt to obviate this possibility.

d. *Review at Request of U.S. Companies*

A more formal mechanism for detecting and correcting incorrect decisions is provided by infrequently used provisions permitting

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[66] 19 C.F.R. § 174.22 (1977).

[67] *See generally* text accompanying note 49 *supra*.

U.S. companies, under certain circumstances, to challenge Customs decisions concerning duties on merchandise imported by others.[68] Under these procedures a U.S. manufacturer, producer, or wholesaler may request information from Customs concerning the duty imposed on particular imports and may file a petition with Customs alleging that the correct duty has not been assessed. However, the request for information and the petition may be filed only with respect to merchandise of the same class or kind as that dealt in by the U.S. company. If the petitioner is dissatisfied with Customs' response to his petition, he may contest the decision by filing an action in the Customs Court, which has exclusive jurisdiction over such actions.[69] As with protests, Customs procedures for handling such petitions are informal—the petitioner may be given an opportunity to meet with the relevant decision-maker and may present evidence, but he is not given a hearing on the record, an articulated basis for the decision, or an opportunity to examine confidential information relied upon in making the decision.

There is no similar mechanism by which importers can challenge Customs decisions made with respect to the merchandise imported by others, and importers have been denied the right to challenge such action in a district court.[70]

e. *Administrative Rulings*

One other aspect of Customs procedure is relevant to the duty assessment process. Because of the many complex issues arising under trade laws, and because importers, exporters, and others often need to know how such issues will be resolved before they engage in trade transactions, Customs provides interested persons with a procedure for seeking an administrative ruling on an issue arising under the laws administered by Customs.[71] Such a ruling may be given if the issue is prospective (*i.e.*, not already raised in the course of Customs processing), is not hypothetical, and all facts needed to make the ruling are supplied.

Once given, a ruling is binding on Customs with respect to the transaction involved (provided that the actual facts do not differ from those on which the ruling was based) and is considered to be authority governing similar transactions. Rulings thought to affect a substantial volume of imports or transactions or to be otherwise of general interest are published in the *Customs Bulletin* and, upon publication, become established Customs practice.[72] However, if a ruling changes prior practices and would result in increased duties or import restrictions, or is thought to be of general interest to the domestic industry, a *Federal Register* notice is published to give interested persons an opportunity to comment on the ruling.[73] There is no procedure for pre-enforcement judicial review of administrative rulings, but any ruling may be challenged as applied to particular import transactions.

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[68] 19 U.S.C. § 1516 (1970). Regulations governing the procedures are contained in 19 C.F.R. § 175 (1977).

[69] 28 U.S.C. § 1582(b) (1970).

[70] Kocher v. Fowler, 397 F.2d 641 (2d Cir. 1967), *cert. denied*, 391 U.S. 920 (1968) (district court has no jurisdiction to compel Customs to collect duties from competitor, even though plaintiff has no recourse through the Customs Court).

[71] 19 C.F.R. § 177 (1977).

Prohibited Imports

The Customs Service is the agency primarily responsible for keeping prohibited merchandise out of the country and ensuring that imported merchandise meets regulatory standards.[74] In fulfilling this role, Customs enforces a large variety of statutes. Some require Customs to decide whether imported merchandise meets regulatory standards; under others, Customs merely enforces a determination made by personnel of another agency.

There is an important distinction between exclusion of merchandise pursuant to a customs law and exclusion of merchandise pursuant to a law that is not a customs law. Exclusion action taken pursuant to a customs law is generally reviewable only in the Customs Court; exclusion action pursuant to a law that is not a customs law is not reviewable in the Customs Court, but may be reviewed in a district court. Unfortunately, no definition clearly distinguishes between a customs law and other laws pursuant to which merchandise is excluded.[75] An importer who seeks review of an exclusion decision in the wrong court may find his case dismissed.[76]

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[72] *Id.* § 177.10(a)–(b) (1977). An increase in a rate of duty or charge under an established and uniform practice may not become effective without 30 days public notice. 19 U.S.C. §1315(d) (1970).

[73] 19 C.F.R. § 177.10(c) (1977). Customs does not provide a formal hearing when considering administrative rulings, but interested persons who know of the ruling may be given an opportunity to present their views orally or in writing. *Id.* § 177.1, 177.4. An importer may also request a district director to furnish advice concerning valuation of merchandise to be entered later. However, unlike administrative rulings, such advice is not binding on Customs during actual appraisement of the merchandise. *Id.* § 152.26.

[74] Although it is an important part of Customs' work, Customs action which results in the exclusion of merchandise from the United States is rarely subjected to challenge in the Customs Court. Less than 1 percent of all protests filed are to challenge such action.

1. *Substantive Issues*

a. *Imports Prohibited Under Customs Law*

An import quota is a control on the quantity of merchandise that may be brought into the country during a specified period (usually one year). Absolute quotas prohibit any importation of merchandise above the quota amount and generally apply to specific products from designated countries. Tariff rate quotas provide for an increased rate of duty on imports after a specified amount of covered merchandise has been imported.

Although quotas are usually established by other governmental entities,[77] Customs may be required to determine the amount of the quota[78] and must determine whether an import comes within a particular quota category.[79] Customs attempts to ensure that quotas are administered fairly: ideally, no importer should be given undue preference, importers should be able to predict into which quota category their product will fall, and information concerning the amount of merchandise imported under each quota category should be disseminated quickly enough to permit importers to estimate when the quotas will be filled. Most quotas are administered on a first come-first served basis; merchandise arriving at a port is released by Customs until the quota is filled. Merchandise arriving after the quota has been filled is generally held in a bonded warehouse until the quota is reopened (usually during the next year), or it may be exported.

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[75] Generally, customs laws are those codified in Title 19 of the United States Code or those applicable to imported but not to domestically produced merchandise. Other laws under which merchandise is excluded are not customs laws. This general distinction is drawn from the cases cited in notes 142–43 (cases in the Customs Court) and 183–86 (cases in the district courts) *infra*. Although there is no authority on this point, seizures under the obscenity statute, 19 U.S.C. § 1303 (1970), are probably best construed to be under a law that is not a customs law; they are actions taken on the advice of U.S. attorneys under standards applicable to both domestic and imported merchandise.

[76] *See, e.g.*, Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements, No. 76–1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied*, (D.C. Cir. Sept. 2, 1977).

[77] Quotas may be established by Congress, by an executive department (*e.g.*, the Department of Agriculture, 7 U.S.C. §1100 (1970)), or the President upon advice of an agency. *See* 19 U.S.C. § 2251(b) (Supp. V 1975). *See generally* E. ROSSIDES, U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, TARIFFS AND TRADE 295–321 (1977).

[78] For example, Customs must determine "the average aggregate apparent annual consumption" of certain fish to determine the applicable tariff rate quota. 42 Fed. Reg. 9739 (1977).

[79] For example, quotas on certain textile articles specify various quantity limits for narrowly defined product categories, and Customs must determine in which category a particular import falls.

Section 304 of the Tariff Act of 1930[80] requires all imported merchandise to be marked in English to show its country of origin. Products not marked in conformity with both the statute and regulations adopted by Customs are not permitted to enter the country and are subject to an additional 10 percent duty if not properly marked at the time of liquidation. Issues arising under this statute usually concern the size, location, and wording of the required marking.[81] Customs laws also prohibit the importation of merchandise produced by "convict or/and forced labor,"[82] and "obscene" matter or matter "advocating or urging treason or insurrection."[83]

b. *Imports Prohibited Under Laws That Are Not Customs Laws*

Many statutes administered or enforced by Customs establish safety or other regulatory standards for products distributed in the United States, including the Lanham Trademark Act, the Consumer Product Safety Act, the Copyright Act, the Food, Drug and Cosmetic Act, and the National Traffic and Motor Vehicle Safety

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[80] 9 U.S.C. § 1304 (1970).

[81] Customs regulations concerning both the wording of the required marking and exceptions to the marking requirements are contained in 19 C.F.R. §134.0–.55 (1977). *See generally* R. STURM, A MANUAL OF CUSTOMS LAW 421 (1974); Note, *Tariff Law—No Option to Import Without Marking*, 12 COLUM. J. TRANSNAT'L L. 596 (1973).

[82] 19 U.S.C. § 1307 (1970). Only one order prohibiting imports under this section is in effect. 19 C.F.R. § 12.42(h) (1977). Preliminary determinations are made by the Commissioner of Customs after such investigation "as appears to be warranted," taking into account representations offered by any interested parties, *id.* §12.42(d), but without formal administrative hearings. The final decision to exclude merchandise is made by the Commissioner of Customs with the approval of the Secretary of the Treasury, and can be protested. *See* text accompanying notes 58–65 *supra*. If the protest is denied, appeal to the Customs Court is possible. *See* text accompanying note 135 *infra*. *See generally* Armstrong, *American Import Controls and Morality in International Trade: An Analysis of Section 307 of the Tariff Act of 1930*, 8 N.Y.U. J. OF INT'L L. & POL. 19 (1975).

[83] 19 U.S.C. § 1305 (1970). Imported matter violating this prohibition is subject to seizure under procedures prescribed by the Supreme Court. United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (forfeiture action must be initiated within 14 days of seizure and completed within 60 days). *See generally* Comment, *Government Seizures of Imported Obscene Matter: Section 305 of the Tariff Act of 1930 and Recent Supreme Court Obscenity Decisions*, 13 COLUM. J. TRANSNAT'L L. 114 (1974).

Act of 1966.[84] Some such statutes absolutely forbid the importation of specified merchandise.[85] Customs' primary task under these statutes is to identify and interdict attempted entry of forbidden products, which may give rise to questions concerning whether a particular import falls within the prohibited class.[86]

Statutes that set standards for, but do not absolutely prohibit, imported merchandise often require that other agencies determine whether imports comply with the statute or applicable regulations.[87] Customs merely enforces such decisions by denying entry to noncomplying products. In such instances Customs action involves little or no discretionary decision-making. Customs acts in accordance with the instructions it receives; if an importer is aggrieved by the exclusion of merchandise under one of these statutes, his complaint is usually with the agency interpreting and applying the standard, not with Customs itself. Nonetheless, Customs does have an important administrative role in identifying products that are subject to various regulatory standards and coordinating examination and testing procedures with the relevant federal agency. In other instances, Customs seeks advice from other agencies when making decisions. For example, in determining whether imported material is either obscene or advocates or urges treason or insurrection within the meaning of the relevant statutes, Customs personnel generally rely upon the advice of U.S. attorneys.

Under still other regulatory statutes Customs action is predicated to a greater degree on its own factual determinations or its interpretation and application of statutory standards. If a trademark registered under the Lanham Trademark Act is also registered with Customs, Customs may deny entry to imported merchandise which "bears"[88] or "copies or simulates"[89] that trademark. Similarly, under the Copyright Act Customs may seize imports which in its determination bear a false copyright notice or infringe a work copyrighted in the United States.[90]

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[84] A complete list of all the statutes enforced by Customs, with relevant citations, is contained in OFFICE OF THE CHIEF COUNSEL, U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, LAWS AND REGULATIONS ENFORCED OR ADMINISTERED BY THE UNITED STATES CUSTOMS SERVICE (Apr. 1975).

[85] *E.g.*, 22 U.S.C. § 1934 (1970) (munitions); 42 U.S.C. §§ 2077, 2122, 2131 (1970)(nuclear material); 15 U.S.C. §§ 1241–1244 (1970) (switchblade knives).

[86] *See e.g.*, Precise Imports Corp. v. Kelly, 218 F. Supp. 494 (S.D.N.Y. 1963), *aff'd*, 378 F.2d 1014 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967)(whether imported knives fell within prohibition on switchblade knives).

[87] *E.g.*, 7 U.S.C. § 1360(c) (Supp. V 1975) (decisions concerning pesticides imported under Federal Insecticide, Fungicide, and Rodenticide Act to be made by Environmental Protection Agency), 21 U.S.C. § 381 (1970) (the Food and Drug Administration certifies foreign establishments as approved sources for pharmaceuticals under the Food and Drug Act and approves importations).

2. *Procedures for Prohibiting Imports*

The determination that merchandise should be excluded from the country is generally made while the goods are held by Customs for inspection. If so, the exclusion process may take one of two courses. Customs may simply refuse to release the merchandise until it is brought into compliance with the applicable regulation, or, if it cannot be brought into compliance, order it to be exported. Alternatively, if authorized by statute, Customs may seize the merchandise (even if the merchandise is still in Customs custody) and proceed by means of administrative forfeiture proceedings, which in turn may lead Customs to initiate an *in rem* forfeiture action in a district court.

a. *Refusal to Release Goods*

Customs enforces most regulatory statutes applicable to imports by refusing to release merchandise determined to be ineligible for entry. For example, if Customs determines that textiles are subject to a quota that is already filled, that televisions are not properly marked to show the country of origin, or that a drug is imported from a noncertified foreign establishment, Customs merely refuses to release the goods. Such determinations are made by the personnel at each port as part of the entry and examination process, and no hearing, evidentiary record, or reasoned opinion is provided.[91]

An importer who seeks to have such a determination reversed might first initiate informal discussions with the import specialist or inspector, his superior at the port, or personnel in the Office of

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[88] 19 U.S.C. § 1526 (1970).

[89] 15 U.S.C. § 1124 (1970). The Lanham Trademark Act, as amended, is codified at 15 U.S.C. §§ 1051–1072, 1091–1096, 1111–1121, 1123, 1127 (1970 & Supp. V 1975).

[90] Congress revised the Copyright Act in 1976, Pub. L. No. 94–553, 90 Stat. 2541 (to be codified at 17 U.S.C. §§ 101–810). As part of the revision, Congress gave Customs authority (to be codified at 17 U.S.C. § 603) to adopt regulations requiring a court order before it can take action against imports.

[91] An importer may decide not to challenge the determination. The importer of textiles may export the merchandise or store it in a bonded warehouse until the next quota period. The importer of televisions may export them or mark them in accordance with Custom's demands. The importer of drugs may attempt to have the foreign establishment certified or may export or destroy the drugs under Customs supervision.

Regulations and Rulings. In addition, if the decision not to release the merchandise is made under a customs law, the importer has 90 days in which to file a protest.[92] Because such a protest involves the exclusion of merchandise, Customs must respond to it within 30 days; if no response is given, or if the protest is denied, the importer can file a summons in the Customs Court seeking review of the issues raised in the protest.[93] Customs procedures for handling such a protest are similar in their informality to procedures used for protests against liquidation decisions.[94]

If the exclusion of merchandise is pursuant to a law other than a customs law, the protest procedures are not available. An importer may utilize internal advice procedures to have the exclusion considered by the Office of Regulations and Rulings,[95] but there are no assurances that such procedures will provide prompt review.[96] Importers faced with continued refusal by Customs to release merchandise may be granted review of that decision in a district court.[97]

b. *Seizure and Forfeiture*

Some of the statutes and regulations enforced by Customs require or authorize the seizure and forfeiture of prohibited merchandise.[98] Under such statutes, seizure is used even if the merchandise has not been released by Customs. Seizure procedures can be illustrated by Customs enforcement of the Lanham Trademark Act.[99]

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[92] 19 U.S.C. § 1514 (1970).

[93] 19 C.F.R. § 174.21 (1977).

[94] *See* text accompanying notes 58–65 *supra*.

[95] The procedures for obtaining internal advice are set forth in 19 C.F.R. § 177.11 (1977). Customs recently published a ruling given under the internal advice procedure at the request of a person whose merchandise had been refused entry as unlawful switchblade knives. *See* 11 CUST. BULL. 7 (1977).

[96] Exclusion often results from a factual or legal determination made by an agency other than Customs, in which event challenge through the administrative process may depend on procedures established by the other agency. Interestingly, the Consumer Product Safety Commission provides an importer with a hearing on the record before an impartial hearing examiner before instructing Customs to prohibit goods from entering the country. *See* 15 U.S.C. § 2066 (Supp. V 1975). This formal procedure for resolving disputed issues contrasts sharply with the more informal procedures used by Customs.

[97] *See* cases cited in notes 183–86 *infra*.

[98] Such statutes are of two types: those that authorize seizure because the merchandise is not allowed in the country, and those that authorize seizure because the person importing the merchandise has violated the law. The procedures described here are applicable to seizures under both types of statutes. Merchandise smuggled into the country is also subject to seizure and forfeiture.

Before seizure, while the goods are held by Customs, the importer is given notice of the alleged violation and an opportunity either to remedy the violation or to persuade Customs that no violation has occurred. With respect to alleged trademark infringement, the importer receives notice that the goods will be detained (*i.e.*, denied entry) for 30 days, during which time the importer may demonstrate that the imports are not infringing any trademark, obtain the trademark owner's consent to the importation, or remove the allegedly offending mark.[100] If the importer does not obtain release of the merchandise by one of these methods within 30 days, the importer is notified of his forfeiture liability, the merchandise is seized, and forfeiture proceedings are instituted.[101] However, the importer is given an opportunity to petition Customs for relief from forfeiture under mitigation provisions.[102]

The mitigation procedure (formally known as a "petition for relief from forfeiture") is initiated when the importer petitions Customs to reverse or otherwise modify its decision.[103] In the case of alleged trademark infringement, the application is reviewed by personnel in the Office of Regulations and Rulings, who hold informal discussions with interested parties—including the U.S. trademark owner—before making a determination. In unusual or significant cases, the Commissioner of Customs or the Secretary of the Treasury may become involved in the administrative ruling.

If the importer does not file a mitigation petition, or if the issue is not resolved through the mitigation procedures, the Service moves to forfeit the goods.[104] Customs may proceed by summary forfeiture when the merchandise is either of a type whose entry is prohibited (as it would be if it allegedly infringed a U.S. trademark), or valued at less than $2,500.[105] It does so by giving the importer notice of summary forfeiture. Only if the importer files a claim for the goods is the case referred to a U.S. attorney for condemnation proceedings in a district court, after which the goods are either released to the importer (if the importer prevails) or destroyed (if Customs prevails).

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[99] 15 U.S.C. §§ 1051–1072, 1091–1096, 1111–1121, 1123, 1127 (1970 & Supp. V 1975). It is unlawful to import merchandise which "bears" or "simulates or copies" a trademark registered under the Act on the Principal Register and with Customs.

[100] 19 C.F.R. § 133.22 (1977). The initial decision to detain merchandise is made by the import specialist, who may seek advice from his immediate superiors or from the Office of Regulations and Rulings in Washington, D.C. In many instances Customs is notified of the suspected infringement by the U.S. owner of the trademark, and inspectors are made aware of the possibility of importations of allegedly infringing merchandise.

[101] 19 C.F.R. § 133.22(c) (1977).

[102] The mitigation procedures are contained in 19 C.F.R. § 171.11–.13 (1977).

[103] In cases of alleged trademark infringement there is slight opportunity for compromise, since the merchandise is not allowed in the country if Customs finds it to be infringing. The mitigation procedures are most often used when Customs is seeking monetary penalties.

[104] Some statutes authorize Customs to proceed against seized property in libel actions, in

If merchandise is valued at over $2,500 and is not of a type whose entry is prohibited, the only way Customs can secure forfeiture of the merchandise following the mitigation procedures is to refer the matter to a U.S. attorney for the institution of condemnation proceedings in a district court.[106] In such condemnation proceedings, rules concerning the burden of proof facilitate the government's proof of a violation of law: once the government shows probable cause for instituting the forfeiture proceeding, the person claiming the property has the burden of proving that the alleged violation of law giving rise to the seizure did not occur.[107]

c. *Recovery of Merchandise After Release*

If Customs determines that merchandise should not be allowed in the country, but the merchandise has already been released to the importer, Customs has two options. If authorized by statute, it may seize the merchandise, in which event the mitigation and forfeiture procedures outlined above are followed. Such procedures are employed, for example, when Customs seizes merchandise alleged to be obscene.

If the merchandise is not subject to seizure, Customs may demand that the goods be delivered to it. The bond filed by the importer guarantees redelivery of merchandise not already sold or disposed of. If the goods are not redelivered upon demand, the importer has breached the bond and Customs may recover from the importer the liquidated damages specified in the bond.[108] Cus-

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which event Customs refers the case to a U.S. attorney for court proceedings without following the summary administrative procedures described in the text. 19 C.F.R. § 162.42 (1977).

[105] *Id.* § 162.46–.47.

[106] *Id.* § 162.49. Merchandise may be seized even if it is not of a type which is prohibited from entering the country, under statutes providing for seizure and forfeiture as a sanction for failure to report or for false or fraudulent practices.

[107] 19 U.S.C. § 1615 (1970).

[108] The procedures described here are also used by Customs to recover liquidated penal-

toms proceeds by giving the importer notice of its claim for liquidated damages and a demand for payment, following which the importer has the opportunity to file a petition for relief, setting forth facts that justify a cancellation of the claim.[109] Such a petition is subject to informal administrative review. The importer may discuss the issues with Customs personnel, but there is no provision for presentation of evidence or cross-examination at a hearing, or for a decision on the record. Most often, the parties reach a compromise and the importer pays a mitigated damage amount. If no compromise is reached (or if the importer does not file a petition for relief), the case can be referred to a U.S. attorney for the institution of an action in a federal district court to recover the liquidated damages stipulated in the bond.[110]

Penalty Provisions

Because the Customs Service relies primarily on information reported by importers, it must be assured that such information is accurate and complete. To further that end, Congress has granted Customs broad authority to impose penalties on those who either fail to report or report in a false or fraudulent manner.

The most notable such authority is contained in 19 U.S.C. § 592 (hereinafter referred to as section 592), which prohibits fraudulent or false statements or practices with respect to imports, and, as a penalty, authorizes Customs to seek forfeiture of either the imported goods or the value of the imported goods. Although there are 40 other statutes which authorize Customs to assess fines or penalties,[111] section 592 is the most often invoked and the most controversial of the penalty provisions.[112]

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ties for noncompliance with the other conditions of a bond—for example, failure to complete entry procedures within stipulated time periods or deliver required documentation.

[109] 19 C.F.R. § 172.1 (1977).

[110] *Id.* § 172.2.

[111] A list of all such statutes is contained in *Procedural Reform Hearings, supra* note 13, at 315 (statement of author) and 541 (statement of Customs Service). *See, e.g.*, 19 U.S.C. § 1460 (1970) (failure to report arrival of a vessel in the United States from a contiguous country); 19 U.S.C. § 1584 (1970) (failure to provide accurate manifests); 19 U.S.C. § 1497 (1970) (failure to properly declare articles upon entry).

[112] Enforcement of Section 592 is an area of Customs activity that has received wide publicity and attention. *See* Dickey, *Customs: Fines, Forfeitures, Penalties and the Mitigation Procedures—Sections 592 and 618 of the Tariff Act of 1930*, 30 Bus. Law. 299 (1975)[hereinafter cited as Dickey I]; Dickey, *Survivals from More Primitive Times: Customs Forfeitures in the Modern Commercial Setting Under Sections 592 and 618 of the Tariff Act of 1930*, 7 Law & Pol'y Int'l Bus. 691 (1975) [hereinafter cited as Dickey II]; Herzstein, *The Need to Reform Section*

Substantively, section 592 prohibits a broad range of conduct, making it unlawful to attempt to bring merchandise into the United States by means of any "fraudulent or false" statement or practice "without reasonable cause to believe the truth" of the statement, whether or not the United States is deprived of duties. The statute also makes it unlawful to aid or procure such false statement or practice, and prohibits any willful act or omission by which the United States may be deprived of duties.[113] Many section 592 cases result from false statements on entry documents, such as understatements of the quantity of goods imported, misstatements of the invoice price of goods, or the omission of information required by Customs to determine the proper appraised value of merchandise—for example, data concerning buying commissions or "assists."[114] If an importer misstates the country of origin of merchandise to avoid restrictions on trading with certain countries or ships merchandise through a third country to avoid a quota, he is subject to penalties under section 592.[115] Section 592 violations are not limited, however, to statements or practices known to be false by the person involved—even a negligent falsehood is prohibited by section 592 if it occurs without a "reasonable cause to believe the truth" of the statement.[116]

The penalty for violation of section 592 is fixed by statute and is

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592 of the Tariff Act of 1930, 10 INT'L LAW. 285 (1976). *See also Modernization Act Hearings, supra* note 9; *Procedural Reform Hearings, supra* note 14.

[113] 19 U.S.C. § 1592 (1970). Two criminal statutes also prohibit false import practices. Using language similar to that in section 592, 18 U.S.C. § 542 (1970) provides for a fine of not more than $5,000 and/or imprisonment for not more than 2 years for false or fraudulent statements or practices. Suspected violations of this provision are referred to U.S. attorneys by the Customs Special Agent investigating the alleged violations, after review and consultation with the Regional Counsel of Customs. *See* U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, CIRCULAR NO. ENF-3-CC (June 10, 1975). Under a second criminal statute, 18 U.S.C. § 545 (1970), it is unlawful to knowingly and wilfully smuggle or clandestinely introduce merchandise into the United States or to make out any false or fraudulent document with intent to defraud the United States. Violations are punishable by a fine of not more than $10,000 or imprisonment for not more than 5 years, or both. *See also id.* § 543.

[114] Assists include blueprints, molds, and dies given by the importer to the foreign manufacturer in connection with the manufacture of merchandise for the importer. The value of such assists must be considered in determining dutiable value and is required to be stated on the entry documents. Often, there is a legitimate dispute concerning which types of services constitute dutiable assists.

[115] U.S. Dep't of the Treasury News Release, *Customs Frauds: Hunting Moths in a Dust Storm* (Oct. 26, 1975). *See also* Dickey I, *supra* note 112, at 303–05.

[116] *See, e.g.*, United States v. Wagner, 434 F.2d 627 (9th Cir. 1970) which interpreted and modified an earlier case holding that intent to defraud was a required element of a section 592 violation. *See also* Kohner v. Wechsler, 477 F.2d 666, 673 n.12 (2d Cir. 1973).

extremely high. Regardless of the culpability of the violator or the revenue loss or other injury to the United States, the penalty is fixed as forfeiture of the imported goods or their value.[117] As a result, Customs often must assess extreme penalties (which may later be mitigated) for relatively insignificant violations.[118] Although Customs is authorized by section 592 to seize merchandise and seek its forfeiture as a sanction, it rarely does this.[119] Customs never seizes merchandise if, as is often the case, it is in the hands of an innocent purchaser[120] when the violation is discovered. Customs regulations were recently amended to provide that merchandise otherwise lawfully in the country may be seized under section 592 only if a district director determines that the violator appears to be insolvent, that his assets are beyond the jurisdiction of the United States, or that seizure is otherwise necessary to protect the revenue.[121] In other instances, monetary penalties are assessed.

Customs initiates the penalty process by sending the person involved—the respondent—a "pre-penalty notice" informing him of Customs' intention to assess penalties under section 592 if he fails to demonstrate within 30 days that such penalties would be improper.[122] After receiving the notice, the respondent, using informal procedures, may persuade the district director that a violation has not occurred or that the assessment of the penalty would be inappropriate for some other reason.[123] If the district director remains unconvinced, he issues a claim of penalty, a form similar to the pre-penalty notice, assessing the full penalty and demanding payment.

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[117] The value of the goods imposed as a penalty is "domestic value" (roughly the price at which the same merchandise would be purchased in the United States) rather than the value used to assess import duties. 19 C.F.R. § 162.43(a) (1977).

[118] The American Importers Association cites an example in which Customs allegedly lost about $200 in revenue because of negligent conduct but assessed a penalty of $135,000. American Importers Association, *Why Customs Penalty Statute (Sec. 592) Must Be Changed!* (unpublished position paper on file with the Administrative Conference of the United States, Washington, D.C.). The Wall Street Journal reports penalty assessments of $110 million against Electronic Memories and Magnetic Corp., $43 million against Control Data Corp., $42.5 million against Standard-Kollsman Industries, Inc., and $40 million against Mattel, Inc. Wall St. J., Mar. 11, 1975, at 42, col. 1.

[119] If merchandise seized under section 592 is worth less than $50,000, it may be released to the owner if the owner deposits with Customs the full value of the merchandise in cash or a letter of credit. *Id.* § 162.44(a).

[120] *Id.* § 162.41(a).

[121] 42 Fed. Reg. 25,323 (1977) *as amended by* 42 Fed. Reg. 27,599 (1977).

[122] If the penalty assessment is less than $25,000, no pre-penalty notice is given; the importer is first notified of the alleged violation when he receives a penalty assessment notice. 19 C.F.R. §§ 102.31, 171.1(b) (1977).

[123] Decisions to assess penalties for section 592 violations are made by district directors, who determine whether a violation has occurred and whether the violation is of sufficient magnitude to warrant penalty proceedings. Often, violations perceived to be non-negligent

After receiving a claim of penalty, the respondent may invoke the mitigation procedures provided under section 618 of the Tariff Act of 1930, which gives the Secretary of the Treasury (and Customs as his delegate) the authority to mitigate forfeitures and penalties upon such terms and conditions as he considers just and reasonable.[124] To invoke these procedures, the respondent files a petition demonstrating that a violation has not occurred or that the penalty should be reduced. If the penalty assessment exceeds $25,000, the Office of Regulations and Rulings decides whether and how much to mitigate the penalty, basing its decision on information submitted by the respondent and on a written report from the district director.[125] Such decisions are discretionary and nonreviewable.[126]

During this process, the respondent generally is given opportunities to discuss the facts of the case with the district director or other decision-maker and to present written information and argument. No formal record is kept, however, and the importer has no formal opportunity to challenge the information relied on against him. If the information is contained in an investigative report compiled by a Customs agent, the importer normally sees only a summary of the information. No statement of the facts or legal principles underlying the decision is made.[127]

Because the assessed penalty is almost always disproportionate to the culpability of the respondent or the loss of revenue resulting from the violation, Customs virtually always offers to mitigate the

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or "technical" are settled without a penalty assessment by permitting the importer to correct the entry documents and pay the revenue deficiency. The district director's decision to assess a penalty is based in part upon information assembled by a Customs investigating agent.

[124] 19 U.S.C. § 1618 (1970).

[125] If the penalty assessment is less than $25,000, decisions concerning mitigation are made by the director of the district in which the goods were entered. 19 C.F.R. § 171.21 (1977).

[126] *See, e.g.*, United States v. One 1961 Cadillac Hardtop Automobile, 337 F.2d 730 (6th Cir. 1964) (federal courts have no jurisdiction to grant remission or mitigation for forfeiture of car used in illegal transportation of narcotics). *Contra*, United States v. One 1974 Mercury Cougar Automobile, 397 F. Supp. 1325 (C. D. Cal. 1975).

[127] Mitigation decisions are formalized by notifying the respondent of the amount to which Customs is willing to mitigate the penalty. The form letter used for this purpose contains no explanation of the basis of the determination. If dissatisfied with this mitigation offer, respondent may file a supplemental petition for mitigation. 19 C.F.R. § 171.33 (1977).

penalty.[128] But such offers to mitigate present the respondent with a hard choice. While the respondent may acquiesce in Customs' decision on the violation and pay the mitigated penalty in settlement of the claim, if he does, he forfeits his right to judicial review. On the other hand, in order to obtain judicial review of the Service's determination the respondent must forego the benefit of mitigation and risk incurring the entire penalty.[129] This dilemma, more often than not, pressures the respondent into accepting the mitigation offer, and as a consequence few section 592 penalty assessments are effectively subject to judicial review.[130] This amounts to what one writer has termed "administrative blackmail."[131]

By assessing a penalty and then offering to compromise

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[128] In 1974, in an effort to increase public understanding of section 592 procedures, the Department of the Treasury published internal guidelines governing such mitigation decisions by Customs. *Guidelines for the Remission or Mitigation of Forfeitures and Claims for Forfeiture Value*, 39 Fed. Reg. 39,061 (1974). In general, the guidelines contemplate that penalties will be mitigated to an amount which reflects the revenue loss resulting from the violation and the culpability of the defendant, taking into account such factors as any contributory error by Customs personnel, respondent's cooperation with Customs investigators, and remedial action taken by the respondent. Customs may reduce penalty assessments to an amount equivalent to the revenue loss resulting from the violation if voluntary disclosure of a violation is made before an investigation has been initiated. 19 C.F.R § 171.1 (1977).

[129] *See* 19 U.S.C. § 1592 (1970). However, in an unreported decision, Andean Credit, S.A. v. United States, No. 73-1294-CIV-WM (S.D. Fla. Dec. 10, 1973), the court refused to order forfeiture of a yacht valued at over $1 million, which it stated would be "so severe a penalty as to be shocking to the conscience of this Court." Instead, the court ordered payment of unpaid duties, which amounted to $60,000.

[130] The pressure to compromise claims is demonstrated by the following information compiled by William Dickey, formerly Deputy Assistant Secretary of the Treasury for Enforcement, Operations, and Tariff Affairs, comparing the original penalty assessments in randomly selected section 592 cases with the amount to which the assessment was mitigated:

(in dollars)

Penalty	*Mitigated Amount*	*Penalty*	*Mitigated Amount*
179,398	34,785	193,400	12,431
1,770,855	5,413	150,876	3,944
345,000	3,244	2,202,413	23,673
219,741	13,275	5,510,450	88,000
2,210,706	30,888	4,714,811	250

See Dickey II, *supra* note 112, at 703-05.

[131] Nelson, *Administrative Blackmail: The Remission of Penalties,*4 West. Pol. Q. 610, 620 (1951). The author referred to use of authority to mitigate penalties by administrative agencies in general. *See also* Murphy, *Money Penalties—An Administrative Sword of Damocles,*2 Santa Clara Law. 113 (1962). Statutes imposing monetary penalties and authorizing administrative agencies to remit or mitigate the penalty are common. *See* Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 Wash. U.L.Q. 265 (1970).

> or mitigate, [an agency] may induce the defendant to settle his alleged liability in order to avoid the risk of incurring the full penalty in a court proceeding. As a result the defendant is often penalized without even an administrative hearing. The safeguard of court review to protect the rights of defendants is bargained away. Court review, however, is intended to serve another purpose. It is the means of confining the actions of errant administrators, of holding them true to the policies laid down by the legislature. The only means of involving this supervision is litigation. If the litigants are bought off, the administrators are free to shape policy as they please.[132]

If a party against whom penalties have been assessed refuses to pay the original or a mitigated penalty, the case is referred to a U.S. attorney for the institution of forfeiture proceedings in a district court. The respondent may be afforded another opportunity to settle the case for less than the penalty amount (even for less than the mitigation amount offered by Customs).[133] Respondents who seek judicial review of penalty assessments face an additional burden in forfeiture proceedings. In such proceedings, the government need only show probable cause for the institution of the suit; if it does, the burden is on the respondent to prove that the penalty statute was not violated.[134]

JUDICIAL REVIEW OF CUSTOMS ACTION

Overview

The Customs Court and U.S. district courts share responsibility for reviewing action taken by the Customs Service.[135] District courts hear cases in which the Service seeks to collect liquidated damages for violation of the terms of a bond, or seeks forfeiture of merchandise under a provision authorizing seizure, or seeks to collect a penalty. The Customs Court has no jurisdiction over such cases.

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[132] Nelson, *supra* note 120, at 611–12 (footnote deleted).

[133] Some attorneys advise their clients not to accept mitigation offers made by Customs because they feel the U.S. attorneys generally offer better settlement terms. There are no procedures governing such settlements.

[134] *See* 19 U.S.C. § 1615 (1970); United States v. Alcatex, Inc., 328 F. Supp. 129, 134 (S.D.N.Y. 1971). *See also* United States v. Nephrite Jade, 325 F. Supp. 986, 989 (W.D. Mo. 1970).

[135] In addition, a court of appeals reviews decisions of the Secretary of the Treasury to revoke or suspend a broker's license. 19 U.S.C. § 1641(b) (1970). This article does not consider the adequacy or propriety of judicial review in such instances. No provision governs judicial review of decisions to deny a license, which are made by the Commissioner of Customs and reviewed by the Secretary of the Treasury.

In other cases, division of jurisdiction between the Customs Court and district courts is governed by the following considerations. The subject matter jurisdiction of the Customs Court[136] is delineated by statute—the court has exclusive jurisdiction to review those Customs actions that are subject to a protest, and to hear appeals by U.S. manufacturers, producers, or wholesalers that are authorized under section 516 of the Tariff Act of 1930. The Customs Court has no jurisdiction to review Customs actions not subject to a protest or petition and may not take jurisdiction over those actions that are subject thereto until a protest (by an importer) or a petition (by a U.S. manufacturer, producer, or wholesaler) has been filed and denied. "Final judgments or orders" of the Customs Court are reviewed by the Court of Customs and Patent Appeals.[137]

Congress has not explicitly provided for review of Customs actions that are not subject to protest or petition. District courts often exercise their general and special jurisdictional powers to review such actions.

Thus, when Customs action does not involve a penalty, forfeiture, or liquidated damages—matters over which only the district courts have jurisdiction—the jurisdiction of the Customs Court controls the division of responsibility between that court and district courts. Because jurisdiction in the Customs Court is available only to those persons authorized to file a protest or petition, and is not available until a protest or petition is denied by Customs, the prerequisites to suit in the Customs Court also limit standing to challenge certain Customs actions as well as the timing of judicial review.

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[136] On the Customs Court generally see R. STURM, A MANUAL OF CUSTOMS LAW 12 (1974); Johnson, *The United States Customs Court—Its History, Jurisdiction, and Procedure,* 7 OKLA. L. REV. 393 (1954); Rao, *A Primer on Customs Court Practice,*40 BROOKLYN L. REV. 581 (1974).

[137] 28 U.S.C. § 1541(a) (1970).

Customs Court Jurisdiction

1. *Suits by importers*

For importers, brokers, and others involved in the importing process, access to the Customs Court is controlled by the protest procedure at Customs. The Customs Court has jurisdiction over suits by importers only if the importer has filed a protest, the protest has been denied by Customs, and the importer has paid all liquidated duties, charges, or exactions.[138]

The subjects over which the Customs Court has jurisdiction in a suit by an importer include all matters subject to a protest under the protest provisions of 28 U.S.C. § 1514, and none others. The Customs Court's jurisdictional statute provides:

> § 1582 Jurisdiction of the Customs Court
>
> (a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officers, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.[139]

With respect to these areas, the jurisdiction of the Customs Court is exclusive.[140] Thus, a suit brought in a district court to review any of the types of administrative actions listed in the seven subparagrahs of section 1582(a) is subject to dismissal for lack of subject matter jurisdiction.[141]

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[138] Protests are filed in accordance with 19 U.S.C. § 1514 (1970), which specifies the seven types of Customs action that are subject to a protest. Actions subject to a protest under this section are identical to those over which the Customs Court has jurisdiction under 28 U.S.C. § 1582 (1970).

[139] 28 U.S.C. § 1582(a) (1970).

[140] *Id.* The exclusivity of Customs Court jurisdiction is reconfirmed by 28 U.S.C. § 1340 (1970), which grants district courts original jurisdiction over "any civil action arising under

Actions by the Customs Service not subject to protest under section 1514 (and thus not within the seven subparagraphs of the court's jurisdictional statute) are not subject to review in the Customs Court. For example, although the Customs Court has jurisdiction to review actions excluding merchandise under a customs law,[142] actions excluding merchandise under a law that is not a customs law are not subject to a protest or to review under section 1582, and hence are not reviewable by the Customs Court.[143] Similarly, navigation fees and certain inspection fees collected by the Customs Service are not "charges or exactions . . . within the jurisdiction of the Secretary of the Treasury" and are subject to neither a protest nor an appeal in the Customs Court.[144]

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any Act of Congress providing for internal revenue, or revenue from imports on tonnage, *except matters within the jurisdiction of the Customs Court*" (emphasis supplied).

[141] Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements, No. 76–1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied* (D.C. Cir. Sept. 2, 1977); SCM Corp. v. Int'l Trade Comm'n, 549 F.2d 812 (D.C. Cir. 1977) (directing district court to retain jurisdiction until Customs Court ruled on its own jurisdiction); Fritz v. United States, 535 F.2d 1192 (9th Cir. 1976); J.C. Penney Co. v. United States Treasury Dep't, 439 F.2d 63 (2d Cir. 1971), *cert. denied,* 404 U.S. 869 (1971); Kocher v. Fowler, 397 F.2d 641 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 920 (1968); N. Am. Cement Corp. v. Anderson, 284 F.2d 591 (D.C. Cir. 1960); E. States Petroleum Corp. v. Rogers, 280 F.2d 611 (D.C. Cir. 1960); Morgantown Glassware Guild v. Humphrey, 236 F.2d 670 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 896 (1956); Boston Wool Trade Ass'n v. Snyder, 161 F.2d 648 (D.C. Cir. 1947); Cottman Co. v. Dailey, 94 F.2d 85 (4th Cir. 1938); Riccomini v. United States, 69 F.2d 480 (9th Cir. 1934); Kreutz v. Durning, 69 F.2d 802 (2d Cir. 1934); Akins v. Saxbe, 380 F. Supp. 1210 (N.D. Maine 1974); Altieri v. United States, 299 F. Supp. 458 (D.P.R. 1969); Horton v. Humphrey, 146 F. Supp. 819 (D.D.C. 1956); Nat'l Sanitary Rag Co. v. Hamilton, 4 F. Supp. 642 (N.D. Cal. 1933).

[142] *See, e.g.*, Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements, No. 76–1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied* (D.C. Cir. Sept. 2, 1977) (exclusion under voluntary quota is within exclusive jurisdiction of Customs Court); Benrus Watch Co. v. United States, 238 F. Supp. 191 (Cust. Ct. 1964) (exclusion for failure to mark watch movements).

[143] *See, e.g.*, V.G. Nahrgang v. United States, T.D. 47,134, 65 TREAS. DEC. 1095 (1934) (refusal of Customs to release imports found adulterated by Food and Drug Administration not subject to Customs Court review). *But see* Karl Schroff & Assocs. v. United States, 47 Cust. Ct. 339 (1961) (government agrees to release merchandise excluded under copyright statute after protest and Customs Court suit; jurisdiction of court not questioned).

[144] *See* Puget Sound Freight Lines v. United States, 36 C.C.P.A. 70 (1949) (navigation fees and charges under 19 U.S.C. § 58 (1970) are not "exactions within the jurisdiction of the Treasury," and thus are not subject to Customs Court review); Louis Ruhe v. United States, T.D. 26,936, 10 TREAS. DEC. 737 (1905), *Aff'd,* T.D. 27,773, 12 TREAS. DEC. 612 (1906) (inspection fee imposed by Department of Agriculture not reviewable in Customs Court).

When Customs assesses liquidated damages for breach of the conditions of an import bond, the Customs Court will normally review the assessment since the liquidated damages are construed to be a "charge or exaction . . . within the jurisdiction of the Secretary of the Treasury" and therefore subject to both protest under section 1514 and review in the Customs Court under section 1582.[145] The Customs Court has jurisdiction to review whether liquidated damages were lawfully assessed for failure to redeliver merchandise to Customs upon demand,[146] failure to submit entry documents within the time specified in a bond for immediate release privileges,[147] and failure to submit proper proof of exportation for merchandise entered temporarily.[148] However, the Customs Court considers only whether the conditions of the bond were violated. It may not review the amount of the liquidated damages set in the bond and assessed by Customs since that is a "legislative matter" that is "within the control of the administrative officers."[149]

The protest requirement limits the jurisdiction of the Customs Court in other ways. The following Customs actions are not subject to protest or to review in the Customs Court: refusal to grant, and suspension of, immediate delivery privileges;[150] refusal to grant, or revocation of, a license to perform the duties of a public gauger or bonded warehouseman;[151] denial of a customhouse broker's license;[152] and decisions concerning the amount of a bond required to be filed.[153]

Such actions are reviewable in a district court. *See, e.g.*, Carriso, Inc. v. United States, 106 F.2d 707 (9th Cir. 1939).

[145] However, to be reviewable in the Customs Court the exaction "must relate in some manner to imported merchandise and affect the importer, consignee, or agent of such imported merchandise." Universal Carloading and Distributing Co., Abstract 35,743, 71 TREAS. DEC. 1083 (1936) (Customs Court declines jurisdiction to review imposition of liquidated damages against bonded carrier for failure to deliver merchandise).

[146] Huber v. United States, 29 Cust. Ct. 92 (1952) *rev'd on other grounds,*41 C.C.P.A. 69 (1953). *But see* Klein v. United States, T.D. 47,281, 66 TREAS. DEC. 297 (1934).

[147] J.M. Altieri v. United States, 46 Cust. Ct. 307 (1961).

[148] Arthur Cook v. United States, 6 Cust. Ct. 114 (1941); Guy Barkam Co. v. United States, 7 Cust. Ct. 155 (1941).

[149] United States v. Frank F. Smith & Co., 25 C.C.P.A. 163, 167–68 (1937).

[150] *See* text accompanying notes 21–28 *supra*.

[151] *See* notes 30 and 34 *supra*.

[152] *See* note 135 *supra*.

[153] American Askania Corp. v. United States, 10 Cust. Ct. 76 (1943). *See* text accompanying note 40 *supra*. In addition, the ability of the Customs Court to correct erroneous Customs action has been limited because the Customs Court has held that the Customs actions involved are discretionary and therefore not subject to review. For example, Customs, as

2. *Suits by U.S. Competitors*

The Customs Court also has exclusive jurisdiction when a petition filed by a U.S. manufacturer, producer, or wholesaler under section 516 of the Tariff Act of 1930[154] is denied.[155] This permits judicial review of the same matters that are subject to a petition under section 516: decisions concerning appraisement, classification, or rates of duty, including antidumping and countervailing duties; a finding by the Secretary of the Treasury of no sales or likelihood of sales at less than fair value under the Antidumping Act of 1921;[56] and a finding by the Secretary of the Treasury under the Countervailing Duty Act[157] that no bounty or grant was bestowed on imports. District courts have no jurisdiction to review these matters.[158]

However, the procedures leading to review in the Customs Court are not available unless the challenged decision relates to

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delegate of the Secretary of the Treasury, is authorized to abate or refund duties on merchandise destroyed while in Customs' custody. *See* 19 U.S.C. § 1563 (1970). The Customs Court has held that it has no authority either to grant such refund if Customs has declined to do so, or to review the merits of Customs' decisions. Deila Failde v. United States, 388 F. Supp. 564 (Cust. Ct. 1963); Michaelian & Kohlberg v. United States, 65 TREAS. DEC. 1372 (1934). Other cases have acknowledged the court's power to determine whether Customs actions under this provision exceed its authority or fail to comply with the terms of the statute, but without indicating that the power would be used to control Customs action effectively. D.M. Ferry & Co. v. United States, 85 F. 550, 557 (6th Cir. 1898); H.Z. Bernstein Co. v. United States, 354 F. Supp. 1364, 1371 (Cust. Ct. 1958). *But see* Art Craft Jewelry Co. v. United States, 64 Cust. Ct. 414, 418 (1970) (without considering right to review, court apparently held plaintiff's claim invalid as a matter of law).

However, the scope of review of such discretionary functions was changed recently when the court adopted Administrative Procedure Act standards for judicial review of discretionary action. Suwanee Steamship Co. v. United States, C.D. 4708 (Cust. Ct. July 18, 1977). The appropriate scope of review of discretionary actions is not considered in this Article.

[154] *See* text accompanying notes 68–70 *supra.* Actions challenging denial of a petition are given precedence in the Customs Court and the Court of Customs and Patent Appeals. 28 U.S.C. §§ 2633, 2602 (1970).

[155] 28 U.S.C. § 1582(b) (1970).

[156] 19 U.S.C. § 160 (Supp. V 1975). The Act authorizes the imposition of a special dumping duty on imports found to have been sold at less than fair value if a U.S. industry is being or is likely to be injured by reason of the importation. The Act also authorizes the imposition of countervailing duties to offset the amount of bounties or grants bestowed upon imported merchandise.

[157] *Id.* § 1303. Section 516 also permits a U.S. manufacturer, producer, or wholesaler to seek review of Customs decisions not to impose special marking duties under 19 U.S.C. § 1304 (1970). Diamond Match Co. v. United States, 44 Cust. Ct. 67 (1960). *See* note 81 *supra* and accompanying text.

[158] *See* Calf Leather Tanners' Ass'n v. Morganthau, 80 F.2d 536 (D.C. Cir.), *cert. denied,* 297 U.S. 718 (1936). *But see* discussion of *Timken v. Simon,* note 196 *infra* and accompanying text.

merchandise that is the same class or kind as that dealt in by the U.S. firm bringing the challenge. Actions of the Customs Service that are not subject to challenge under section 516 may not be challenged in the Customs Court.[159]

Character and Powers of the Customs Court

The Customs Court has been designated by Congress as "a court established under Article III of the Constitution"[160] and is composed of nine judges appointed by the President with the advice and consent of the Senate. The judges hold office for life during good behavior.[161] Legislation provides that no more than five judges may be appointed from the same political party and that the chief judge is to be designated "from time to time" by the President.[162]

The court has national jurisdiction, encompassing controversies arising in any state or territory of the United States. Although the court is located in New York City, it is empowered to, and does, hold trials or hearings at any port or place within its jurisdiction.[163] Moreover, the chief judge may order a judge of the court to preside at an evidentiary hearing in a foreign country, unless such hearings are prohibited by the laws of such country.[164]

The court has been given all the powers of a district court for preserving order, compelling the attendance of witnesses, and requiring the production of evidence,[165] and the rules of the Customs Court provide a full system of pre-trial discovery from parties and nonparties, including the production of documents, requests for admissions, interrogatories and depositions,[166] as well as complete motion practice.[167] Cases are usually heard and decided by a single judge, but the chief judge may appoint three judges to hear and decide cases involving a constitutional question or an issue with "broad or significant" implications.[168]

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[159] E.C. Miller Cedar Lumber Co. v. United States, 86 F.2d 429, 434 (C.C.P.A. 1936) (decisions concerning measure, weight, and quantities of imported merchandise, which determine duty assessments, not subject to challenge).

[160] 28 U.S.C. § 251 (1970). This provision was enacted to overrule *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929), which held that the Court of Customs Appeals (the predecessor of the Court of Customs and Patent Appeals) was a legislative court not established under Article III of the Constitution. *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1965).

[161] 28 U.S.C § 252 (Supp. V 1975).

[162] 28 U.S.C § 251 (1970).

[163] *Id.* § 256; Cust. Ct. R. 2.2(a).

[164] 28 U.S.C. § 256 (1970).

[165] *Id.* § 1581. *See also id.* § 2637 (witnesses; inspection of documents). The court's authority to impose sanctions for failure to respond to discovery requests is articulated in Cust. Ct. R. 6.5(b)(2). *See, e.g.*, Gehrig, Hoban & Co. v. United States, 76 Cust. Ct. 277 (1976). The court may also punish persons for criminal contempt of court under 18 U.S.C. § 401 (1970). Holt v. United States, 41 C.C.P.A. 8 (1953); In re Spector, 42 Cust. Ct. 726 (1959).

The Court of Customs and Patent Appeals and the Customs Court itself have often said that the Customs Court lacks "equity" jurisdiction and "equity power."[169] What is meant by such statements is far from clear; the decisions convey at least two different meanings. In one sense, the statement that the Customs Court has no equity power signifies that the Customs Court lacks jurisdiction to review administrative action before a protest has been filed and denied.[170] As so understood, the Customs Court's lack of equity power invites consideration of whether—and under what circumstances—the Customs Court should be authorized to intervene in the administrative process prior to filing and denial of a protest. That question is covered by the recommendations set forth later in this article.

Other decisions referring to the lack of equity power in the Customs Court have done so in a different context, indicating that the Customs Court will adhere to procedural statutes or regulations even when a strict interpretation leads to unexpected or unjust results.[171] These cases suggest that Customs should adopt a more flexible approach when substantial interests otherwise would suffer because of harmless, inadvertent procedural errors,[172] but they do not suggest that the Customs Court's jurisdiction should be changed and would not be affected by the recommendations in this article.

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[166] CUST. CT. R. 6.

[167] *Id.* R. 4. *See generally* Rao, *A Primer on Customs Court Practice,* 40 BROOKLYN L. REV. 581 (1974).

[168] 28 U.S.C. § 255 (1970).

[169] *See, e.g.,* Eurasia Import Co. v. United States, 31 C.C.P.A. 202, 211 (1944) and cases cited in notes 170 and 172 *infra.*

[170] *See, e.g.,* Matsushita Elec. Indus. Co. v. United States Treasury Dep't, 67 Cust. Ct. 328 (1971), *aff'd,* 485 F.2d 1402 (C.C.P.A. 1973), *cert. denied,* 414 U.S. 21 (1973) (Customs Court denied its own equity power by refusing to invoke All Writs Act to review administrative action not subject to protest but allegedly ripe for review).

[171] *See, e.g.,* Bullocks, Inc. v. United States, 7 Cust. Ct. 12 (1941) (although error occurred because Customs officer failed to mark documents properly Customs not required to reliquidate entries pursuant to a prior judgment); Olaf V. Sundt v. United States, 4 Cust. Ct. 114 (1940) (Customs Court has no "equity powers" to hear claim for remission of duties when petition for remission was filed just after the 60 day deadline).

[172] The other cases in which the "equity power" of the Court has been denied also reflect strict adherence to provisions of law, despite plaintiff's claim that the result is inequitable. Cummins-Collins Distilleries v. United States, 36 C.C.P.A. 88 (1949) (rejecting plaintiff's claim that it is inequitable to require plaintiff to pay higher duty after goods have been sold at price calculated to include only low estimated duty); Carl Matusek Shipping Co. v. United

When the Customs Court does have jurisdiction following the denial of a protest or petition, it is unclear whether the court has the power to issue injunctions or writs of mandamus.[173] The court has never issued a writ in those circumstances; nor has it been asked to do so, but there is authority to the effect that it could do so. Under the All Writs Act[174] "all courts of the United States" (and thus the Customs Court)[175] have the right to issue writs in aid of their respective jurisdictions. The Court of Customs and Patent Appeals has issued writs under this Act in both patent and customs cases,[176] and it is likely that, were it faced with the issue, the Customs Court would hold that once it has jurisdiction it is authorized to issue writs in appropriate cases under the All Writs Act. In any event, the recommendations of this article would confer explicit authority on the Customs Court to issue injunctions.

It is also unclear whether the Customs Court may issue declaratory judgments. In an early case, *Eurasia Import Co. v. United*

States, 331 F. Supp. 1386 (Cust. Ct. 1963) (plaintiff's failure to file proper form is sufficient reason to deny drawbacks); Gilbert W. Greene v. United States, 13 Cust. Ct. 237 (1944) (no "equity power" to consider importer's claim that he would have been exempt from duties had he not followed Customs' erroneous advice with respect to filing of forms).

Other cases have required strict adherence to procedural rules without referring to the Court's lack of "equity power." American Mail Lines, Ltd. v. United States, 34 C.C.P.A. 1 (1946) (protest dismissed because grounds relied upon at trial were different from those contained in protest); Nikko Boeki, Int'l, Inc. v. United States, 71 Cust. Ct. 16 (1973) (protests dismissed because filed three days prior to liquidation; protest to be valid must be filed after liquidation); Best Foods, Inc. v. United States, 147 F. Supp. 749 (Cust. Ct. 1956) (same).

[173] The *Matsushita* case, *supra* note 170, did not address that precise issue. There, the Customs Court held that it could not exercise power under the All Writs Act until after the jurisdictional prerequisite of a denied protest had been satisfied. *See also* Dexter v. United States, 11 Cust. Bull. 50 (Cust. Ct. Feb. 9, 1977).

[174] 28 U.S.C. § 1651(a) (1970).

[175] *Id.* § 451. Moise Products Co. v. United States, 37 Cust. Ct. 135 (1956).

[176] United States v. Boe, 543 F.2d 151 (C.C.P.A. 1976) (the Court of Customs and Patent Appeals has jurisdiction under All Writs Act to order Chief Judge of Customs Court not to take jurisdiction); Cook v. Dann, 522 F.2d 1276 (C.C.P.A. 1975) (asserting court's power to issue writs, but refusing to exercise such power in absence of executive abuse of discretion); Import Motors, Ltd. v. Int'l Trade Comm'n, 530 F.2d 937 (C.C.P.A. 1975) (enjoining the International Trade Commission from precluding plaintiff from hearing in a section 337 proceeding), *vacated*, 530 F.2d 940 (C.C.P.A. 1975); Weil v. Dann, 503 F.2d 562 (C.C.P.A. 1974) (asserting court's power to issue writs, but refusing to exercise power where it would not foster effective appellate review); Loshbaugh v. Allen, 404 F.2d 1400 (C.C.P.A. 1969) (acknowledging mandamus power, but refusing to suspend a proceeding before the Commissioner of Patents).

States,[177] the Court of Customs and Patent Appeals stated in *dictum* that the Customs Court could not issue declaratory judgments, but did not expressly consider the effect of the Declaratory Judgment Act. That statute provides that:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, *any court of the United States,* upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration (emphasis supplied).[178]

In a subsequent decision, the Customs Court, without referring to *Eurasia*, indicated that it could issue declaratory judgments but declined to do so on the ground that it would be improper under the circumstances.[179] These are the only two cases dealing with the Customs Court's authority to issue declaratory judgments.

District Court Jurisdiction

As a result of the statutory limitations on Customs Court jurisdiction, certain Customs actions may be reviewable only in a federal district court. Suits seeking forfeiture, monetary penalties, or liquidated damages under a bond are brought in a district court. If Customs seizes goods, but has not initiated forfeiture or condemnation proceedings, the district court has jurisdiction to require Customs to do so.[180] The Customs Court does not have jurisdiction in cases involving forfeiture or penalties, even if a protest against the exclusion of merchandise has been filed and denied.[181]

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[177] 31 C.C.P.A. 202 (1944).

[178] 28 U.S.C. § 2201 (1970).

[179] Moise Products Co. v. United States, 37 Cust. Ct. 135 (1956)(declaratory judgment is improper when plaintiff is seeking an interlocutory ruling on law to be applied at administrative level). It is established that controversies concerning import duties do not concern "Federal taxes" and are not outside the Declaratory Judgment Act for that reason. *See* Algonquin SNG, Inc. v. Federal Energy Administration, 426 U.S. 548 (1976). It is unclear what effect, if any, United States v. King, 395 U.S. 1 (1969), has on this question. There, the Supreme Court ruled that the Court of Claims, which is also "a court of the United States" could not issue declaratory judgments, but that holding was based on the unique position and history of the Court of Claims.

[180] *In re* No. 32 E. 60–7th St., 96 F.2d 153, 156 (2d Cir. 1938); *In re* Behrens, 39 F.2d 561, 563 (2d Cir. 1930).

[181] United States v. American Metal Co., 12 Ct. Cust. App. 440, 444 (1925); Sheldon & Co. v. United States, 8 Ct. Cust. App. 215, 218 (1917); M.M. Scher & Sons, Inc. v. United

District Court jurisdiction over other Customs actions is dependent upon an interpretation of Customs Court jurisdiction: district courts may take jurisdiction under one of their general or specific jurisdictional provisions[182] when the Customs Court does not have jurisdiction over the subject matter. This occurs most frequently when Customs excludes merchandise under a law that is not a customs law—action subject neither to a protest nor to review in the Customs Court. Under this scheme, district courts have subject matter jurisdiction to review exclusion of merchandise under the Food, Drug, and Cosmetic Act (a decision made by the Food and Drug Administration);[183] exclusion of goods such as switchblade knives (a decision made by Customs);[184] exclusion of oil pursuant to a quota imposed by the President under section 22 of the Agricultural Adjustment Act;[185] and under former procedures, exclusion of goods which allegedly copy a registered trademark (a decision made by Customs).[186]

Interestingly, when district courts have jurisdiction over Customs action, they may provide immediate relief against unlawful Customs action before administrative procedures surrounding a protest or petition are completed.[187] In those situations, district courts

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States, 24 Cust. Ct. 243 (1950)(mitigated penalty is not an exaction subject to protest or review).

[182] 28 U.S.C. § 1331 (1970) (where matter in controversy "arises under the Constitution, laws or treaties of the United States"); *id.* § 1340 (matters "arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court"); *id.* § 1346(a)(2) ("any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress").

[183] Sugarman v. Forbragd, 405 F.2d 1189, 1190 (9th Cir. 1968) (review of FDA order excluding allegedly adulterated coffee beans); The James J. Hill, 65 F. Supp. 265, 269 (D. Md. 1946) (review of FDA order to export or destroy wheat); Goodwin v. United States, 371 F. Supp. 433, 436 (S.D. Cal. 1972) (exclusion by FDA).

[184] Precise Imports Corp. v. Kelly, 218 F. Supp. 494 (S.D.N.Y. 1963) (exclusion of switchblade knives under criminal statute), *aff'd,* 378 F.2d 1014 (2d Cir.), *cert. denied,* 389 U.S. 973 (1967).

[185] C. Tennant Sons & Co. of New York v. Dill, 158 F. Supp. 63 (S.D.N.Y. 1957).

[186] Croton Watch Co. v. Laughlin, 208 F.2d 93 (2d Cir. 1953) (exclusion under trademark laws). *See also* Richard J. Spitz, Inc. v. Dill, 140 F. Supp. 947 (S.D.N.Y. 1956) (district court has jurisdiction to consider exclusion made under Foreign Assets Control Regulations); Carriso, Inc. v. United States, 106 F.2d 707 (9th Cir. 1939) (district courts have jurisdiction to challenge certain navigation fees collected by Customs).

[187] *See* Croton Watch Co. v. Laughlin, 208 F.2d 93 (2d Cir. 1953); Richard J. Spitz, Inc. v. Dill, 140 F. Supp. 947 (S.D.N.Y. 1956). Indeed, one of the reasons importers attempt to invoke district court jurisdiction is to avoid the procedural prerequisites of Customs Court jurisdiction. *See, e.g.*, J.C. Penney Co. v. United States Treasury Dep't, 439 F.2d 63 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

have greater ability to control administrative action than does the Customs Court, which must wait until a protest or petition is filed and denied before assuming jurisdiction.

When the subject matter under challenge is within the exclusive jurisdiction of the Customs Court, it is generally held that the district court has no jurisdiction,[188] even if the Customs Court is unable to hear the case because procedural prerequisites have not been completed.[189] Cases to that effect are premised on the notion that Congress intended the Customs Court to offer a "complete system of corrective justice"[190] in matters over which it has jurisdiction. Therefore, the prerequisites for Customs Court review are taken as limitations on judicial review of Customs actions by district courts. Persons not authorized to petition or protest subject matter within the Customs Court's jurisdiction may not challenge such action in the district court.[191] Persons for whom the protest or petition procedures might someday be available may not challenge Customs action in the district court without invoking those procedures, even if the Customs Court remedy is alleged to be ineffective.[192]

A few decisions have stated that in "exceptional and extraordinary" circumstances a district court might properly enjoin Customs Service action if such action threatened irreparable injury, even though the subject matter was within the exclusive jurisdiction of the Customs Court.[193] However, this exception has never been invoked.[194] Increasingly courts have recognized that because of the limitation on its jurisdiction and power the Customs Court may not provide a "complete system of corrective justice" for matters within its jurisdiction. Such courts have taken jurisdiction over matters seemingly within the jurisdiction of the Customs Court, refusing to hold that limitations on Customs Court jurisdiction necessarily imply limitations on their own jurisdiction. Thus, even though the Customs Court normally reviews administrative action of the Secretary of the Treasury under the Antidumping Act of 1921 and district courts do not,[195] in *Timken Co. v. Simon,*[196] the district court took jurisdiction over a suit by a U.S. manufacturer to consider whether a refusal of the Secretary of the Treasury to exact dumping duties on certain importations was lawful. In affirming, the court of appeals reasoned that because the action was not subject to a petition under section 516, it was not within the exclusive jurisdiction of the Customs Court, thus rejecting the notion that section 516 limits reviewability of actions not specifically subject to review through the protect and petition procedures.

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[188] *See* cases cited in note 129 *supra*. In at least one case, a district court has reviewed administrative action that would normally be within the exclusive jurisdiction of the Customs Court without considering the jurisdictional issue. Norman G. Jensen, Inc. v. United States, 355 F. Supp. 466 (D. Minn. 1973) (in declaratory judgment action, court ruled that Customs Service had lawfully imposed duties on imported merchandise that was not later exported as promised).

[189] *See, e.g.*, SCM Corp. v. Int'l Trade Comm'n, 549 F.2d 812, 815 (D.C. Cir. 1977); J.C. Penney Co. v. United States Treasury Dep't, *supra* note 174; Fritz v. United States, 535 F.2d 1192 (9th Cir. 1976).

[190] Argosy, Ltd. v. Hennigan, 404 F.2d 14, 20–21 (5th Cir. 1968) (quoting *Cottman Co. v. Dailey*, 94 F.2d 85, 88 (4th Cir. 1938)).

[191] *See* Kocher v. Fowler, 397 F.2d 641 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 920 (1968); Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements, No. 76–1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied*, (D.C. Cir. Sept. 2, 1977).

[192] J.C. Penney Co. v. United States Treasury Dep't, *supra* note 187. *Cf.* SCM Corp. v. Int'l Trade Comm'n, 549 F.2d 812 (D.C. Cir. 1977) (Customs Court must initially rule on its own jurisdiction before a district court can proceed to exercise jurisdiction).

[193] *E.g.*, Argosy, Ltd. v. Hennigan, 404 F.2d 14, 21 (5th Cir. 1968); Cottman Co. v. Dailey, 94 F.2d 85, 89 (4th Cir. 1938); Horton v. Humphrey, 146 F. Supp. 819, 821 (D.C.C. 1956).

Similarly, in *Massachusetts v. Simon*[197] the district court took jurisdiction over a suit challenging license fees imposed by the President on imported oil, even though traditionally the Customs Court has reviewed Presidential actions which result in increased duties.[198] Although it is not clear from the opinion, jurisdiction may have been exercised simply because some of the plaintiffs before the court could not have filed a protest or challenged the license fees in the district court. These cases suggest that confusion concerning the respective jurisdictions of the Customs Court and district courts will continue as long as the jurisdiction and powers of the Customs Court are narrowly limited.

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[194] The narrow scope of this exception is exemplified by Horton v. Humphrey, 146 F. Supp. 819 (D.D.C. 1956), where the court declined to take jurisdiction even though the challenged Customs action was alleged to have put plaintiff out of business and Customs Court review was alleged to be too untimely to provide effective relief.

[195] *See, e.g.*, Cottman Co. v. Dailey, 94 F.2d 85 (4th Cir. 1938); Horton v. Humphrey, 146 F. Supp. 819 (D.D.C. 1956). *Compare* 19 U.S.C. § 169 (1970) *with id.* §1516 (Supp. V 1975).

[196] 539 F.2d 221 (D.C. Cir. 1976).

[197] No. 75-0129 (D.D.C. Feb. 21, 1975), *rev'd sub nom.*, Algonquin SNG, Inc. v. Federal Energy Administration, 518 F.2d 1051 (D.C. Cir. 1975), *rev'd,* 426 U.S. 548 (1976).

[198] United States v. Star Indus., Inc. 462 F.2d 557 (C.C.P.A.) (review of duty assessed on brandy imported from Spain), *cert. denied*, 409 U.S. 1076 (1972); United States v. Best Foods, Inc., 47 C.C.P.A. 163 (1960) (review of fee imposed on peanuts); United States v. Schmidt Pritchard & Co., 47 C.C.P.A. 152, *cert. denied*, 364 U.S. 919 (1960) (presidential proclamation under the escape clause).

ANALYSIS AND RECOMMENDATIONS

Introduction

Except when it revokes or suspends a broker's license, the Customs Service acts through informal procedures. Decisions are made and actions are taken without a formal record, without an opportunity to examine or cross-examine witnesses or formally test the validity of information, without articulated support for decisions, and without an independent decision-maker. In part, these procedures are required by the nature of the work Customs does. Many of the functions Customs performs could not be carried out through formal adjudicatory proceedings at the administrative level. The assessment and collection of duties, for example, would absorb an enormous amount of resources if Customs were required to establish the classification and value of all merchandise in a formal adjudicatory setting. Informal procedures permit the Customs Service to take action without first demonstrating to an independent trier of fact that the information it relies upon is accurate. This is generally appropriate because a significant number of issues resolved by the Service are relatively easy to decide or are noncontroversial. Informal procedures facilitate disposal of most issues without controversy, and resolution of most controversies without the burdens of formal proceedings.

On the other hand, much of what Customs does involves adjudication:[199] import specialists, customs inspectors, district directors and their staffs, and lawyers at headquarters make (even if they do not articulate) findings of fact and apply general standards contained in legislation and regulations.[200] Accordingly, the procedural formalities normally associated with a trial-type hearing may be important to ensure fair and correct determinations.

Tension therefore exists between the need for the administrative system to be fast and flexible and the need for the safeguards of more formal adversary proceedings. Present procedures resolve this tension by combining informal administrative procedures with judicial review for those aggrieved by administrative decisions. After duties are assessed informally, an importer may protest the assessment, and if the protest is denied, challenge the assessment in the Customs Court. There, "review" is a hybrid of review and *de novo* adjudication. The Customs Court does not review an administrative record; decisions are based on a record compiled *de novo* before it.[201] But this is not, strictly speaking, a trial *de novo* because the Customs Court does not make an independent determination of contested issues. Instead, the action of the Customs Service is presumed to be correct and the party challenging that action has the burden of proving that the action is incorrect.[202]

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[199] This is generally true whether "adjudication" is defined as broadly as in section 551(7) of the Administrative Procedure Act ("agency process for the formulation of an order") or more narrowly and conventionally as Professor Davis would define it (disposition of an issue, other than by rulemaking, involving legal right or legal obligations of named parties). *See* Davis, *Revising the Administrative Procedure Act*, 27 AD. L. REV. 35, 40 (1977).

[200] As long ago as 1810, Chief Justice Marshall referred to a customs collector (the official who then assessed duties) as a "quasi-judge." Scott v. Negro Ben, 10 U.S. (6 Cranch) 1, 3 (1810).

The administrative-judicial process just described appears to be proper in most instances (although the recommendations of this article would eliminate the additional burden of proof now borne by parties challenging Customs action). The present informal decision-making process should be retained at the administrative level so that most issues can be disposed of quickly and flexibly. Resolving disputed issues through judicial proceedings rather than through formal administrative procedures permits the administrative process to proceed expeditiously, but provides the adversary context and procedural formalities which are necessary to assure sound decisions and judicial control over Customs action. At the same time, the presumption of correctness underlying Customs decisions facilitates the informal administrative process by shifting the burden of proof to persons challenging Customs action.

Even though the framework in which issues are raised and resolved appears to be sound, much can be done to improve the operation of administrative and judicial procedures within that framework. The informality of the present administrative process used by Customs places a heavier responsibility on the process of judicial review than there would otherwise be. A court is the only forum in which issues arising from administrative action can be decided in an adversary proceeding by an impartial decision-maker on the basis of an evidentiary record. Accordingly, judicial review should be available and timely, as well as sufficiently broad in scope to overturn incorrect administrative action.

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[201] However, 28 U.S.C. § 2632(f) (Supp. V 1975) provides that when the summons is served the Customs Service is to transmit a copy of certain entry documents, the protest and denial thereof, any laboratory reports, and official samples of the merchandise "as part of the official record of the civil action" in the Customs Court.

[202] *Id.* § 2635(a).

Courts improve the administrative process by creating substantive standards for channelling discretionary action and requiring the agency to develop rules, procedures, and statements of policy.[203] The recommendations discussed below would assist the Customs Court in fulfilling that role by broadening its subject matter jurisdiction, increasing its powers to enable it to grant timely relief, revising the rules concerning the burden of proof that currently preclude the reversal of erroneous administrative action, and modifying procedures that preclude judicial review in penalty cases.

There are, however, limits to the ability of a court to structure administrative discretion or require an agency to do so;[204] it may be too restrained by resources, natural conservatism, or the complexity of the task to control agency discretion effectively. It is likely that nonjudicial scrutiny of administrative procedures themselves may yield more productive procedural changes than attention focused in the context of an adversary proceeding. While it is recommended that direct attention be given to revising the procedures Customs uses in performing its function, analysis of such revision is beyond the scope of this article.

Courts are also limited in their ability to improve administrative procedures, because their only opportunity to do so is when a dispute is brought before them. If persons whose interests an agency should protect do not, or may not, challenge agency action, there is no opportunity for judicial correction.[205] This problem is particularly significant in the administration of the customs laws. Much of what Customs does will go unchallenged if Customs exercises its discretionary powers in favor of its primary and most immediate constituency, the importers. This is true because many persons with interests the Service is designed to protect (*e.g.*, consumers) either lack a sufficient interest to challenge Customs actions or lack standing to seek administrative or judicial correction of erroneous Customs action. The proposals herein would provide procedures so that such persons could challenge Customs actions.

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[203] K. Davis, Discretionary Justice: A Preliminary Inquiry 57–59 (1969); K. Davis, Police Discretion 121–38 (1975); Wright, Book Review, 81 Yale L. J. 575 (1972). The efficacy of judicial control of informal and discretionary agency action is just beginning to be studied. Freedman, *Summary Action by Administrative Agencies*, 40 U. Chi. L. Rev. 1, 55–64 (1972). Sofaer *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 Colum. L. Rev. 1293 (1972); Thomforde, *Controlling Administrative Sanctions*, 74 Mich. L. Rev. 709, 734–51 (1976); Vicery, *Judicial Review of Informal Agency Action: A Case Study of Shareholder Proposal Letters*, 28 Hast. L.J. 307 (1976); Wright, *New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process*, 29 Ad. L. Rev. 59 (1977).

[204] Sofaer, *supra* note 203, at 1375; Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1696 (1975); Williams, *Securing Fairness and Regularity in Administrative Proceedings*, 29 Ad. L. Rev. 1, 33 (1977). The Supreme Court almost seems to have accepted these limitations as precluding effective judicial innovation. *See, e.g.*, Renegotiation Bd. v. Grumman Aircraft Eng'r Corp., 421 U.S. 168 (1975) (agency need not explain decisions, even if public interest suffers otherwise); Butz v. Glover Livestock Co., 411 U.S. 182 (1973) (reversing appeals court decision requiring agency to explain inconsistent decisions); Camp v. Pitts, 411 U.S. 138 (1973) (*de novo* review of informal adjudication not required); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (formal findings not required for informal action). *But see* Morton v. Ruiz, 415 U.S. 199 (1974) (agency must let standards be known to avoid reality and appearance of arbitrary denial of benefits).

Many of the recommendations included herein would strengthen the role of the Customs Court in overseeing substantive and procedural aspects of Customs activity, sometimes by taking review authority away from the district courts. When this is so, it is because the issues raised require the experience or expertise of the Customs Court and because of the advantages in having a unified body of customs law established through a national court.

The question arises whether the Customs Court is qualified for the task. It is clear that the recommendations made here will be effective only if the judges of the Customs Court use new authority imaginatively and forcefully. Because the quality of appointments to the court will influence whether the goals underlying the recommendations can be achieved, the process of selecting judges should be reviewed to ensure that the best possible appointments are made.

As an institution, the Customs Court seems capable of fulfilling the role envisioned in this article. The national jurisdiction of the court assures uniformity of treatment. The court is well funded and staffed. It has the authority to compel the attendance of witnesses and the production of documents, and may punish persons for contempt.[206] The rules of the Customs Court were revised and modernized along the lines of the Federal Rules of Civil Procedure soon after passage of the Customs Court Act of 1970,[207] and now provide for full discovery and motion procedures. The Act strengthened the Customs Court as an institution by enabling the court to reduce its substantial backlog of cases.[208] These reforms not only streamlined Customs Court procedure, but left the resources of the court relatively underutilized. Indeed, one of the attractive features of relying on the Customs Court for more judicial control over Customs action is that the court appears able to take on new responsibilities without requiring significant additional resources. This conclusion is supported by the available statistics[209] and by the fact that some Customs Court judges frequently sit on federal district courts.

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[205] For the view that administrative law should reflect he fact that agencies mediate disputes between various interests see Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1671 (1975).

[206] *See* note 165 and accompanying text *supra*.

[207] Pub. L. No. 91-271, tit. I, 84 Stat. 274 (1970) (codified in scattered sections of 28 U.S.C.).

If there is a drawback in relying upon the Customs Court for strengthened review of Customs action, it is that the Customs Court sits primarily in New York City, while district courts are more accessible to other ports. Litigants at ports other than New York presumably would prefer to challenge Customs actions in their local district courts. However, this drawback can be overcome. The Customs Court can use its authority to hear cases at places other than New York.[210] Some judges of the court might sit permanently in locations outside of New York—particularly on the West Cost, where customs work has grown most rapidly in recent years.[211] Finally, the court might experiment with using long distance video communications in emergency situations so that litigants can present arguments to the court without appearing in New York in person.

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[208] *Id*. The Act consolidated into one trial issues previously raised in separate consecutive trials (one on valuation and a second on classification of merchandise). In addition, the Act reduced Customs Court congestion by allowing the Service to revise appraisements while a suit is pending in court, by reducing from three to one the number of judges assigned to hear cases, by dropping the rule that all protests denied by Customs be referred automatically to the Customs Court, and by lengthening the time within which a denied protest could be appealed, thus decreasing the number of cases appealed by importers merely to preserve the possibility of appeal. *See* H.R. REP. No. 1067, 91st Cong., 2d Sess. 9 (1970).

[209] The statistical information available is difficult to appraise because it does not necessarily reflect factors such as the time spent at trial or difficulty of the issues. Over 23,000 "cases" were terminated during fiscal year 1976, but many were disposed of collectively by trying a single test case. In fact, only 64 cases were tried that year (an average of seven per judge), while an additional 869 cases were disposed of on the basis of stipulations or dispositive orders. Seventy-three written decisions were published, and 721 decisions were made with only short abstracts summarizing the subject matter. *See* U.S. Customs Court, Report for the Fiscal Year Ending June 30, 1976 (1976) (available from the U.S. Customs Court, New York, N.Y.). These figures are consistent with statisics concerning the workload of the court in prior years. Of course, these figures—which seem to indicate that the court has substantial unused judicial resources—do not necessarily reflect the time spent in the trial or decision of cases or the time spent on deciding nondispositive motions.

[210] 28 U.S.C. § 256 (1970).

[211] Between 1970 and 1975 the total value of foreign trade from West Coast ports—including both imports and exports—rose 160 percent. For ports in California alone, foreign

Jurisdiction and Powers of the Customs Court

1. *Customs Court Jurisdiction Without a Protest or Petition*

Congress should amend 28 U.S.C. § 1582 to broaden the jurisdiction of the Customs Court by giving the court exclusive jurisdiction of any civil action brought to challenge final agency action (as defined in the Administrative Procedure Act) of the Customs Service. Two types of actions should be excepted from this jurisdiction: those specifically subject to review in another court, and those pertaining to the exclusion of merchandise under a law that is not a customs law taken by the Customs Service on the request or at the direction of another federal agency.

Because under present law a protest by an importer or a petition by a U.S. manufacturer, producer, or wholesaler must be filed and denied before the Customs Court has jurisdiction, the administrative process at Customs is insulated from challenge in the Customs Court until the protest or petition process has run its course. Neither Customs action nor inaction can be reviewed or controlled by the Customs Court except through those procedures.[212]

This system has three adverse effects. First, it unduly limits the subject matter jurisdiction of the Customs Court, because final Customs action that is not subject to a protest or petition under 19 U.S.C. § 1514 (1970) is never reviewed in the Customs Court.[213]

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trade increased 20 percent in the first 10 months of 1976, with imports increasing more than 28 percent. Wall St. J., Jan. 20, 1977, at 1, col. 5.

[212] *See* text accompanying notes 112–34 *supra*.

[213] There are many examples. Refusal to license a broker is not subject to either protest or petition or to any other articulated procedure leading to judicial review (although revocation or suspension of a broker's license is subject to judicial review). Suspension of immediate delivery privileges as well as the amount required to be filed as a bond are not subject to protest or petition and therefore are not subject to review in the Customs Court. It has been suggested that an importer required to file an unduly large bond might refuse to file the bond and then protest the subsequent exclusion of his merchandise (which would follow if no bond were filed). However, this is an uncertain and circuitous remedy. One seeking review concerning the amount of a bond should not be forced to give up control of his merchandise in order to challenge the decision.

It is not possible or desirable to list all of the Customs actions which are final and which would be subject to review in the Customs Court under this recommendation. The purpose of the recommendation is to give the Customs Court general jurisdiction to ensure that a forum is always available to review final decisions of the Customs Service.

Although such actions might be reviewed in a district court,[214] challenges there are inadequate. There is no certainty that the district court will take jurisdiction; it may not if it concludes that the action is within the exclusive jurisdiction of the Customs Court or that Congress intended the action to be nonreviewable.[215] Uncertainty concerning the availability of judicial review is in itself sufficient reason to provide for review of all final actions of the Service. Moreover, even assuming that the district court would take jurisdiction, Customs Court review would be preferable, since the judges of the Customs Court are more familiar with Customs procedures and terminology and have a level of expertise not possessed by the district court bench. This recommendation would therefore expand the subject matter jurisdiction of the Customs Court to include review of all final actions of the Customs Service, and would make such jurisdiction exclusive.

The recommendation would also dispel confusion concerning review of actions resulting in exclusion of merchandise. Presently, exclusion of merchandise under a law that is not a customs law is not subject to a protest or to review in the Customs Court, even if it is Customs that decides that the merchandise is prohibited or restricted. Instead, review is in a district court, although district courts have no special expertise or experience which favors them as a reviewing forum in those cases. Review of Customs exclusion decisions should be in the Customs Court so that substantive and procedural aspects of all such decisions are uniformly adjudicated.[216]

A second adverse effect of the limitations on Customs Court jurisdiction is that the Customs Court is not authorized to review Customs inaction—that is, failure or refusal of Customs to act when it should. Normally, the failure of an agency to act when it should is considered "agency action" which may be final for purposes of judicial review.[217] But unlawful inaction at the Customs Service generally is not subject to protest or petition and therefore is not subject to review in the Customs Court.[218]

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[214] *See, e.g.*, Gallagher and Ascher Co. v. Simon, No.76C–3499 (N.D. Ill. Oct. 12, 1976) (granting temporary restraining order against withdrawal of immediate release privileges).

[215] *See* notes 189–90 *supra* and accompanying text. *See, e.g.*, J.C. Penney Co. v. United States Treasury Dep't, *supra* note 187, at 98.

[216] However, the recommendation would not authorize the Customs Court to review exclusion cases for which the court has no special expertise or experience. Obscenity cases, for example, would continue to be brought in district courts. The portion of the recommendation governing which exclusion cases will be reviewed in the Customs Court is discussed in more detail below.

[217] 5 U.S.C. § 551(13) (1970). *See, e.g.*, Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 862 (4th Cir. 1961).

A significant instance of inaction is refusal or failure of the Service to proceed with liquidation when it otherwise could and should. Because Customs is not required to complete liquidation within any period of time, the courts afford the sole remedy when a liquidation (or other action) is unjustifiably delayed. Yet present jurisdictional limitations preclude the court from deciding whether such inaction is unlawful. Two recent cases challenging delay in completing liquidation illustrate the problem.[219] In both cases the Customs Court was found to lack jurisdiction since liquidation had not taken place, and therefore, no protest had been filed and denied. This result should be changed.

Judicial review is not the only way of controlling unlawful delay in agency action. Legislation before the House of Representatives, for example, would impose time limits on liquidation decisions.[220] The recommendation here would not preclude such procedural improvements; nor would it be rendered obsolete by them. Judicial review of agency inaction is an important control on the discretionary functions of administrative agencies and should be available with respect to the Customs Service. The Administrative Procedure Act requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed,"[221] a general standard to which the Customs Service should be held.[222]

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[218] One particularly striking example of erroneous, but unreviewable, Customs inaction is provided by *United States v. Astra Bentwood Furniture Co.*, 28 C.C.P.A. 205 (1940). There the importer was denied Customs Court jurisdiction to challenge the assessment of duties because no notice of liquidation had been posted (though plaintiff had received one). Customs' failure to post a notice of liquidation was held not subject to a protest and thus not subject to challenge in the Customs Court.

[219] United States v. Boe, 543 F.2d 151 (C.C.P.A. 1976) (under All Writs Act, Chief Judge of Customs Court ordered not to take jurisdiction over case before a protest has been filed and denied); Dexter v. United States, 11 CUST. BULL. 50 (Cust. Ct. Feb. 9, 1977) (Customs Court has no jurisdiction under the All Writs Act to consider whether liquidation is unreasonably withheld).

[220] Under the legislation, merchandise not liquidated within 1 year of entry or withdrawal from a warehouse is deemed liquidated at the amount of duties paid at the time of entry or withdrawal, unless the time is extended to obtain additional information or liquidation is suspended pursuant to statute or court order. H.R. 8149, 95th Cong., 1st Sess. § 218 (1977).

[221] 5 U.S.C. § 706 (1970).

[222] At least one district court has taken jurisdiction and ordered Customs to proceed with appraisement. In *Alto Plastics Mfg. Co. v. Hann,* No. 70-2056-JWG (C.D. Cal. Nov. 3, 1971), the district court found that Customs had "unreasonably delayed appraisement" and ordered that appraisement be completed, basing jurisdiction on 28 U.S.C. § 1361 (1970). The fact that district courts might be available to provide relief in such instances does not detract

Limited Customs Court jurisdiction produces a third adverse effect—inability of the system to afford protection against irreparable injury in the customs context. As George Bronz, a former leader of the customs bar, has said:

> If Customs officers exclude merchandise from entry or delivery, the importer cannot always wait four months for administrative reconsideration, plus an even longer period for a full-scale trial and decision by the Customs Court. An importer with an unresolved duty issue can assume the financial risk, and continue his imports. An importer whose product is refused entry must suspend his business until the conclusion of judicial proceedings. Apart from the expense of warehousing in bond, the merchandise may be perishable, or, when quotas are involved, the quota period may run out. Today, the importer has no real access to judicial review in such cases.[223]

The recommendation here would permit the Customs Court to provide timely relief if exclusion (or other Customs action) threatens irreparable injury where the normal protest process has not been completed.

Basing Customs Court jurisdiction on the denial of a protest or petition is consistent with the general principle that administrative remedies should be exhausted before action is subject to review. In most routine cases involving review of duty assessments this premise is appropriate since importers are guaranteed a refund if they have overpaid estimated duties, and there is generally little harm in delay. The exhaustion principle thus avoids disruption of the administrative process. However, there are recognized exceptions and qualifications to that principle which permit courts

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from the importance of the recommendation here. The remedy in a district court is uncertain; district court might hold that the matter is within the exclusive (but unobtainable) jurisdiction of the Customs Court. *See* notes 189–90 *supra.*

[223] *Hearings on S. 2624 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 205 (1969) (statement of George Bronz). *See also* address by George Bronz, Second Judicial Conference of the United States Court of Customs and Patent Appeals (May 29, 1975), *reprinted in* 69 F.R.D. 119, 181–88 (1976). The American Bar Association, without recommending an expansion in the jurisdiction of the Customs Court, has recommended that Congress authorize the court to "assume jurisdiction prior to the otherwise required exhaustion of all administrative remedies to prevent irreparable injury." That principle is incorporated in legislation now before the Senate. S. 1430, 95th Cong., 1st Sess. (1977).

to review agency action before all administrative remedies have been exhausted,[224] particularly when the administrative remedy is inadequate because it fails to offer relief commensurate with the plaintiff's claim[225] or to protect against irreparable injury.[226] The recommendation here, by adopting the more flexible concept of final agency action from the Administrative Procedure Act,[227] incorporates these considerations.

The deficiencies in Customs Court review that result from the jurisdictional prerequisite of a denied protest or petition—limitations on subject matter jurisdiction, inability to review Customs inaction, and inability to protect against irreparable injury—operate with respect to all of the Customs functions described in this article, as well as to other Customs actions for which there is no judicial review. The recommendation would correct these deficiencies by giving the Customs Court authority to review Customs action outside of the normal procedure, while preserving the protest and petition procedures for those cases to which they are applicable. The question of standing to challenge final agency actions which are subject to review is addressed separately below.

Two types of cases would be exempted from the expanded jurisdiction of the Customs Court. The first, cases specifically subject to review in another court, includes several types of administrative action not reviewable in the Customs Court: actions under the Freedom of Information Act (now subject to review in a district court); actions involving personnel (now subject to review in the Court of Claims); and actions revoking or suspending a broker's license (now subject to review in a court of appeals). This proviso, particularly as it pertains to the revocation or suspension of brokers' licenses, was not based upon a decision that present judicial review procedures are adequate. More adequate review might be had in the Customs Court or the Court of Customs and Patent Appeals, particularly of revocation or suspension of brokers' licenses. Contemplation of such a change, however, would require a much more thorough review of the subject than the scope of this article would allow.

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[224] K. Davis, Administrative Law of the Seventies 446 (1976); B. Schwartz, Administrative Law § 173 (1976). *See* Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action,* 51 Ind. L.J. 817, 859 (1976).

[225] The phrase is that of Professor Jaffe. L. Jaffe, Judicial Control of Administrative Action 426 (1965), *citing* Skinner and Eddy Corp. v. United States, 249 U.S. 557 (1919) (to attack ICC authorization of railroad rates without a hearing it is not necessary to seek remedy in administrative proceedings) *and* R.A. Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir. 1962) (to attack order requiring petition for exemption from securities registration requirements it is not necessary to first seek such an exemption).

[226] *See, e.g.,* Utah Fuel Co. v. Nat'l Bituminous Coal Comm., 306 U.S. 56 (1939) (in course of proceeding, agency proposes to reveal a document claimed to contain confidential information).

[227] Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 865–66 (4th Cir. 1961).

The second exemption is more complicated. Under present law, decisions to exclude merchandise may be made by the Customs Service, the President, the International Trade Commission, or one of a number of other federal agencies. All such decisions are implemented by the Customs Service. For purposes of review, present law distinguishes between exclusion under a customs law and exclusion under other laws. If exclusion is pursuant to a customs law, review is obtained by filing a protest and appealing denial of the protest to the Customs Court, rather than to a district court. This is true whether the exclusion decision is made by the Customs Service (*e.g.*, by interpreting the statute requiring country-of-origin marking) or by the President (*e.g.*, by imposing a quota). Where exclusion is under a law that is not a customs law, no protest may be filed and therefore the Customs Court has no jurisdiction, even if the exclusion decision is made by the Customs Service (*e.g.*, under the law barring switchblade knives) rather than by another agency.

The recommendation and the second exemption would change this scheme in only one respect. As previously mentioned, each exclusion decision made by the Customs Service would be subject to review in the Customs Court rather than in a district court, whether taken pursuant to a customs law or a law that is not a customs law. The recommendation would not change the forum for review in other exclusion cases. Exclusion decisions by the President or another agency under a customs law would continue to be subject to protest and review in the Customs Court. This is desirable because such cases raise trade policy issues which the Customs Court is well suited to hear. Exclusion decisions by other agencies or by a court pursuant to a law that is not a customs law would be subject to review in the forum in which they are presently reviewed.[228] These cases generally raise issues for which the Customs Court has no expertise and which usually are decided by the district court when the law is applied to domestic goods. Consequently, there would be no advantage and some disadvantages to transferring jurisdiction over such cases to the Customs Court.[229]

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[228] Thus, obscenity cases under 19 U.S.C. § 1305 (1970) would continue to be brought in district courts rather than the Customs Court.

2. *Power to Enjoin or Compel Actions*

Congress should amend 28 U.S.C. § 1581 to confer upon the Customs Court the remedial powers of a district court in respect of actions properly pending before it.

This recommendation is a corollary to the preceding recommendation expanding the jurisdiction of the Customs Court. Both the Customs Court and the Court of Customs and Patent Appeals have taken a narrow view of the powers of the Customs Court. Decisions refer to the lack of "equity power" of the court and raise doubts about the ability of the court to provide effective relief in appropriate circumstances under the All Writs Act or the Declaratory Judgment Act.[230] To the extent that such decisions are premised on the fact that the court may provide no relief until the protest or petition procedure has been completed, they would be modified by the previous recommendation. To the extent that such decisions indicate that the judicial power of the court is inferior to that of other courts, they would be changed by this recommendation. To the extent that such decisions reflect a judgment on the merits concerning the claim before the court, they would not be modified.

The proposed change is necessary to ensure that the Customs Court can provide timely and effective relief by, for example, "compel[ling] agency action unlawfully withheld or unreasonably delayed;"[231] "postpon[ing] the effective date of agency action or preserv[ing] the status or rights" of persons pending appeal;[232] issuing writs in aid of its jurisdiction;[233] or declaring the rights and other legal relations of parties before it in any case of actual controversy within its jurisdiction.[234] The recommendation is expressed broadly so that the court may not disclaim the authority to grant proper relief in appropriate cases. Its language is adopted from a proposal of the American Bar Association which has been incorporated in legislation introduced by Senator DeConcini.[235]

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[229] This Article does not address the adequacy of judicial review of exclusion decisions made by agencies other than the Customs Service.

[230] *See* notes 169–79 *supra* and accompanying text.

[231] 5 U.S.C. § 706(1) (1970).

[232] *Id.* § 705.

[233] 28 U.S.C. § 1651(a) (1970).

[234] *Id.* § 2201.

3. *Political Affiliation of Court Appointees and Selection of the Chief Judge*

Congress should amend 28 U.S.C. § 251 to delete the requirement that not more than five of the nine judges of the Customs Court be appointed from the same political party and to provide that the chief judge be appointed by the President with the advice and consent of the Senate.

The Customs Court is unique among Article III courts in the selection of its judges and chief judge. Section 251 of Title 28 of the U.S. Code requires that not more than five of the nine judges of the Customs Court be appointed from the same political party and that the chief judge be selected by the President. Both requirements were originally enacted when the Board of General Appraisers (the precursor of the Customs Court) was established in 1890 as a quasi-administrative, quasi-judicial body to review classification and valuation of imports.[236] The Board of General Appraisers evolved into a judicial body[237] and in 1926 was renamed the Customs Court, but the provisions concerning the political affiliation of its judges and the appointment of a chief judge were never changed. They are outdated, unnecessary, and inconsistent with the notion of an impartial judiciary.

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[235] S. 1430, 95th Cong., 1st Sess. (1977). *See* 123 CONG. REC. S6787 (daily ed. Apr. 29, 1977). Similar legislation was introduced in the previous session of Congress by Senator Hruska. S. 3871, 94th Cong., 2d. Sess. (1976). *See* 122 CONG. REC. S17,121 (daily ed. Sept. 29, 1976).

[236] Customs Administrative Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131 (1890) (current version at 28 U.S.C. § 251 (1970)). *See generally* W. FUTRELL, THE HISTORY OF AMERICAN CUSTOMS JURISPRUDENCE 136–37 (1941); R. SMITH, CUSTOMS VALUATION IN THE UNITED STATES 131 (1948).

[237] The evolution of the Board of General Appraisers from an administrative-judicial body to a judicial body was recognized in *Stone v. Whitridge*, 129 F. 33 (4th Cir. 1904), *rev'd on other grounds sub nom. United States v. Whitridge*, 197 U.S. 135 (1905) ("the Board is an independent tribunal, empowered by law to pass upon certain controversies between the Government and the importer, and in this respect the Board is no more subordinate to the Treasury Department than is any other Court"). Thereafter, in the Payne-Aldrich Tariff Act, ch. 6, § 28, ¶ 12, 36 Stat. 11 (1909) (repealed 1913), Congress gave the Board "all the powers of a circuit court of the United States;" in the Tariff Act of 1922, ch. 356, § 518, 42 Stat. 972 (1922), the Board was given all the powers of a district court to preserve order, compel attendance of witnesses and production of evidence, and punish for contempt; and in the Tariff Act of 1930, ch. 497, § 518, 46 Stat. 737 (1930) (current version at 28 U.S.C. § 252 (1970)), the judges of the Customs Court were given life tenure, subject to good behavior, thus rendering them immune to executive removal.

It is recommended that the language concerning the political affiliation of court appointees be deleted by Congress.[238] The appointment of a chief judge should follow one of the methods used with respect to other courts. The chief judges of the Court of Claims and the Court of Customs and Patent Appeals are appointed by the President, with the advice and consent of the Senate, and hold office for their judicial tenure.[239] In the courts of appeals and district courts, the chief judge is a judge in regular service "who is senior in commission and under seventy years of age."[240]

Because of the significant responsibilities and authority of the chief judge, it is proposed that the chief judge of the Customs Court, like the chief judge of the other national courts, be appointed by the President with the advice and consent of the Senate. The chief judge of the Customs Court supervises administration of the court;[241] promulgates the dockets, designates the judge or (in three-judge cases) judges to try cases, and reassigns them "when circumstances so warrant;"[242] decides when three-judge courts are appropriate,[243] and assigns judges to hear cases at other ports or in foreign countries.[244] These responsibilities make it desirable that the selection of the chief judge be made with a view to his administrative abilities, which is only possible if the chief judge is an appointee.[245]

Standing to Seek Administrative and Judicial Review

Congress should amend 19 U.S.C. § 1516 to allow any person adversely affected by an incorrect determination of the appraised value or classifica-

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[238] This recommendation is now before Congress in S. 1430, 95th Cong., 1st Sess. (1977), following a similar recommendation of the American Bar Association.

[239] 28 U.S.C. § 171 (1970) (Court of Claims); *id.* § 211 (Court of Customs and Patent Appeals).

[240] 28 U.S.C. § 45 (1970) (courts of appeals); *id.* § 136 (district courts).

[241] 28 U.S.C. § 253(a) (1970).

[242] *Id.* § 255(b)–(c). Three-judge courts are provided whenever the action "(1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the Customs laws." *Id.* § 255(a).

[243] 28 U.S.C. § 255 (1970).

[244] *Id.* § 256.

[245] This proposal is similar to one under consideration by the Department of Justice. The Department's proposal, however, would require the chief judge selected by the President to step down as chief judge when he reached the age of 70.

tion of, or rate of duty assessed upon, imported merchandise to obtain from the Customs Service information concerning such decision and to petition for a change. Denials of such petitions should be reviewable in the Customs Court.

Congress should enact a new statutory provision giving any person adversely affected by an action of the Customs Service concerning merchandise that is (or should be) excluded from entry or delivery, a means of seeking administrative review of such action. Subsequent review in the Customs Court should be provided. However, such a procedure should not be available to challenge action excluding merchandise upon request or order addressed to the Customs Service by a court or another federal agency taken under a law that is not a customs law.

If Congress broadens the jurisdiction of the Customs Court as recommended above it should also provide that actions within the broadened jurisdiction may be brought by any adversely affected person who has exhausted his administrative remedies.

Public participation in the administrative process has been called one of the "cornerstones for contemporary administrative law and for the future."[246] But public participation has not been a noticeable part of the administrative process at the Customs Service. This is unfortunate. The Customs Service makes decisions that affect many interests, including those of importers, competing U.S. companies, foreign suppliers and exporters, and purchasers of imported merchandise. When those interests are adversely affected, Customs' action should be subject to challenge through administrative procedures and judicial review. These recommendations would revise the laws which preclude such challenges.[247]

Presently, the only formal means of seeking administrative review of decisions made by the Customs Service is to file a protest or petition. Protests may be filed only by the importer or consignee of the merchandise subject to the protested Customs action, by their agents,[248] or by a person to whom merchandise placed in a bonded warehouse has been transferred.[249] A petition may be filed only by a U.S. manufacturer, producer, or wholesaler of the same class or kind of merchandise as that affected by the Customs action challenged. Moreover, the petition procedures allow challenges to only three types of action: (1) decisions concerning the classification or appraised value of, or rate of duty on, merchandise; (2) decisions not to impose countervailing or antidumping duties; and (3) determinations that merchandise is not being, or is not likely to be, sold at less than fair value under the Antidumping Act of 1921, or has not received a bounty or grant under the Countervailing Duty Act. U.S. manufacturers, producers, and wholesalers seeking to challenge Customs actions concerning a class of merchandise in which they do not deal, and other persons wishing to challenge Customs action through the administrative process, have no means of doing so.

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[246] Williams, *Securing Fairness and Regularity in Administrative Proceedings*, 29 Ad. L. Rev. 1, 15 (1977).

[247] The Customs Service has procedures to provide "interested parties" with an administrative ruling setting forth "a definitive interpretation of applicable law, or other appropriate information." 19 C.F.R. § 177.1 (1977); *see* text accompanying notes 71–73 *supra.* This procedure is not a substitute for the right to challenge Customs action, however, and is often inadequate because of delays in issuing rulings. The rulings are only given to persons "with a direct and demonstrable interest in the question or questions presented;" they are issued only with respect to prospective transactions to a person who submits all relevant facts; and they are not subject to review until after they are applied to particular transactions. 19 C.F.R. § 177 (1977). As a result, rulings are of little value to a person not directly involved in the transaction for which the ruling is sought.

Similar limitations restrict standing to seek judicial review of Customs actions. The Customs Court has no jurisdiction to review Customs action unless a protest or petition has been denied by Customs. District courts may take jurisdiction over Customs actions that are not in the exclusive jurisdiction of the Customs Court,[250] but the Customs Court, because of its expertise and continuing control of Customs actions, would provide a better forum for review. Moreover, district courts have no jurisdiction over actions subject to a protest or petition procedure (since review of such actions is exclusively in the Customs Court) even if the plaintiff is not authorized to file a protest or petition.[251] In short, many persons who may be adversely affected by decisions of the Customs Service have no effective means of challenging those decisions at either the administrative or the judicial level. These recommendations would provide such means.

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[248] 19 U.S.C. § 1514 (1970).

[249] *Id.* § 1557(b).

[250] *See, e.g.*, Timken Co. v. Simon, 539 F.2d 221 (D.C. Cir. 1976) (suit to challenge failure to withhold appraisement under the Antidumping Act).

[251] *See, e.g.*, Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements, No. 76–1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied* (D.C. Cir. Sept. 2, 1977)(discussed in text accompanying notes 253–55 *infra*); Kocher v. Fowler, 397 F.2d 641 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 920 (1968) (discussed in note 257 *infra*).

To understand the impact of these proposals, one should consider the effect they would have on those who may be adversely affected by Customs actions—U.S. manufacturers, producers, and wholesalers, competing importers, foreign suppliers, and consumers. U.S. companies whose products compete with imported merchandise have an important stake in decisions made by the Customs Service. Indeed, many of the laws administered by Customs were enacted to protect such firms. But a U.S. manufacturer, producer, or wholesaler may challenge Customs actions under the petition provisions of section 516 only if he deals in the same class or kind of merchandise as that to which the challenged action pertains. As a result, a cattle producer may not challenge duty assessments on imported hides or leather goods (a different class or kind of merchandise), even if his sales to producers of hides suffer because imports are facilitated by erroneous Customs action. Similarly, a manufacturer of steel may not challenge duty assessments on auto bodies even if he is injured when Customs fails to collect the proper duties.[252]

The recommendation would amend section 516 so that any adversely affected person could challenge decisions on classification, rates of duty, and appraisement.

The types of decisions U.S. companies may challenge formally also are restricted. The procedures under section 516 do not provide for challenges to the admission of merchandise or to the procedures Customs employs to inspect, assess, weigh, or otherwise process merchandise. Yet those actions, if erroneous or inadequate, could adversely affect U.S. businesses which Congress intended to protect through many of the trade laws.

This proposal also would authorize standing for persons who buy merchandise from importers: manufacturers, wholesalers, retailers, and consumers. Such persons are not authorized to file a protest or petition or otherwise challenge Customs action, despite the fact that they may be injured by the actions—for example, decisions concerning duties directly affect the price of merchandise, and decisions to exclude merchandise directly affect both availability and price. Normally, interests of these persons are protected by importers (who are affected most directly by the decisions). However, importers may have neither resources nor incentive to challenge erroneous Customs action, especially if they can pass price increases on to their customers or otherwise avoid the impact of the decisions. Thus, customers of importers may be left without a remedy against erroneous Customs action.

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[252] No case has been found which directly raises this issue, but the statute seems fairly clear on this point. The term "class or kind" of merchandise is not defined in section 516 or any other provision of the customs laws, although it is used in other provisions. *E.g.*, 19 U.S.C. § 160 (Supp. V 1975).

In *Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements,*[253] for example, Consumers Union brought suit in a district court to challenge textile quotas imposed by the President under Section 204 of the Agricultural Act of 1956. After questioning the plaintiff's standing to sue in federal court,[254] the Court of Appeals directed dismissal of the case because the subject matter—exclusion of merchandise under a customs law[255]—was within the exclusive jurisdiction of the Customs Court. However, the Customs Court may not be able to hear the case. If Consumers Union itself does not import the textiles subject to a quota, it may not file a protest against the exclusion of the textiles, and therefore, may not seek review of the exclusion in the Customs Court. Under these circumstances, there may be no court available to adjudicate the claim made by Consumers Union.

Foreign suppliers also have an important stake in decisions made by the Customs Service, but have no means of challenging such decisions. Customs decisions to increase duties or exclude merchandise may cost them outlets for their merchandise by causing importers to switch suppliers. If this occurs, there is no sound reason for prohibiting foreign suppliers from challenging the action. Foreign suppliers are an important source of competition and provide consumers with many products which could not otherwise be obtained. When Customs is erroneously protectionist, these companies should not be barred from protecting their own and their customers' interests.

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[253] No. 76–1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied* (D.C. Cir. Sept. 20, 1977).

[254] The Court of Appeals intimated that plaintiff's interest in the matter was too indirect and not within the relevant "zone of interest" since plaintiff's purchases of textiles were for testing purposes rather than consumer use. *Id.* slip op. at 6.

[255] This is the first case holding that merchandise excluded under a quota imposed by the President is excluded under the provisions of a customs law. A case cited by the court, W. Dairy Products, Inc. v. United States, 373 F. Supp. 568 (Cust. Ct. 1974), *aff'd*, 510 F.2d 376 (C.C.P.A. 1975), involved review of a classification decision that triggered a licensing restriction imposed by the President, but not review of the licensing restriction itself. *Compare* Massachusetts v. Simon, No. 75–0192 (D.D.C. Feb. 21, 1975), *rev'd sub nom.,* Algonquin SNG, Inc. v. Federal Energy Administration, 518 F.2d 1051 (D.C. Cir. 1975), *rev'd,* 426 U.S. 548 (1976) (reviewing license fees imposed by President on imported oil and petroleum products) *with* cases cited in note 186 *supra*. The Customs Court has traditionally reviewed Presidential action that results in increased duties. United States v. Best Foods, Inc., 47 C.C.P.A. 163 (1960) (fee imposed on peanuts); United States v. Schmidt Pritchard & Co., 47 C.C.P.A. 152, *cert. denied,* 364 U.S. 919 (1960) (Presidential proclamation under the escape clause); Star Indus., Inc. v. United States, 462 F.2d 557 (C.C.P.A.), *cert. denied*, 409 U.S. 1076 (1972) (Presidential proclamation suspending certain trade agreement concessions).

The most controversial aspect of this recommendation is that it would enable importers to challenge Customs decisions made with respect to the merchandise of competing importers. Under present law, only the importer or consignee of merchandise may protest decisions concerning that merchandise. Other importers may not, and therefore may not seek review in the Customs Court. Moreover, since such decisions are within the exclusive jurisdiction of the Customs Court,[256] district courts do not have jurisdiction to review them. But an importer may be injured by Customs decisions concerning the merchandise of his competitor. The adversely affected importer, like the adversely affected domestic competitor, should be afforded an opportunity to challenge the decision.

There have been two principal objections to this proposal. The first is that there is neither pressing need nor demonstrable support for it. Importers, it is claimed, have other means of protecting their interests. If Customs makes a decision that favors one importer over another importing the same merchandise, the second importer usually can protect his interest by seeking (through the protest procedure) to have his merchandise treated in the same manner. However, this is not always true. Customs may appraise one importer's merchandise at the correct value, but appraise that of another at an incorrectly low value; the first importer could neither successfully challenge the correct appraisement of its own merchandise nor eliminate the advantage given its competitor by the erroneous decision. The same situation can arise if the two companies import different, but nonetheless competing, merchandise (*e.g.*, copper and aluminum).[257]

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[256] *See, e.g.*, Kocher v. Fowler, 397 F.2d 641, 642–43 (D.C. Cir. 1967), *cert. denied*, 397 U.S. 920 (1968).

[257] *See, e.g., id.* There Customs decided to permit duty-free treatment for watch movements imported from the Virgin Islands. T.D. 54,821(2), 94 TREAS. DEC. 154 (1959). Appellant was an importer of Swiss watches who claimed "injury in his business relations" as a result of this allegedly unlawful interpretation of the statute. 397 F.2d at 642. Yet plaintiff's suit was dismissed because exclusive jurisdiction over the matter (the assessment of duties) was in the Customs Court. Plaintiff, who could not sue in the Customs Court, was denied any effective remedy.

The second objection raised to this proposal is that the procedures could be used to harass competitors or seek confidential business information. Importers, in particular, are concerned that competitors might seek the names of foreign suppliers or information concerning prices or costs—information which is asserted to be of commercial value.[258]

A partial response to these concerns is that for 50 years U.S. manufacturers, producers, and wholesalers have been authorized to challenge Customs duty assessments,[259] but there is no evidence that such procedures have been misused. Although importers may have more incentive than U.S. manufacturers, producers, or wholesalers to learn the sources and commercial practices of their importing rivals, the apparent lack of abuse of existing procedures suggests that concerns about the disclosure of confidential information may be exaggerated.

More importantly, procedures already adopted by the Customs Service and the Customs Court to protect information that is legitimately confidential reduce the likelihood that the standing procedures recommended here would be abused. Customs will not disclose to any person "information pertaining to trade secrets, business operations, and commercial or financial information of importers, exporters, and other persons who transact Customs business."[260] Specifically:

> Information contained in invoices, entries, vessel manifests, export declarations, official reports of investigating officers, records pertaining to the licensing of and the revocation or suspension of a license of a customhouse broker, and other papers or documents filed with Customs officers for any official purpose which contain trade secrets, or commercial or financial information, is exempt from disclosure except for the purpose for which such documents are required to be filed.[261]

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[258] Similar concerns have been raised with respect to the disclosure of confidential business information under the Freedom of Information Act. For a comparison, *see* Patten and Weinstein, *Disclosure of Business Secrets under the Freedom of Information Act: Suggested Limitations*, 29 AD. L. REV.193 (1977).

[259] Act of September 21, 1922, ch. 356, tit. IV, § 516, 42 Stat. 970 (current version at 19 U.S.C. § 1516(b) (1970)).

[260] 19 C.F.R. § 103.10(c) (1977). This Freedom of Information Act rule is also applied to requests for information filed by a U.S. manufacturer, producer, or wholesaler under section 516. *Id.* § 175.21(b).

[261] 19 C.F.R. § 103.10(d)(1) (1977).

Moreover, confidential information developed in connection with an investigation under the Antidumping Act of 1921 is exempt from disclosure[262] and criminal penalties may be imposed for the unauthorized release of confidential information by government employees.[263] The Customs Court will also protect the confidentiality of information. The statute which would be amended pursuant to these recommendations provides that "in an action instituted by an American manufacturer, producer, or wholesaler, the plaintiff may not inspect any documents or papers of a consignee or importer disclosing any information which the Customs Court deems unnecessary or improper to be disclosed."[264] This has been applied in cases brought by U.S. manufacturers, producers, and wholesalers wherein the Customs Court has issued protective orders restricting information developed through discovery to attorneys and experts for the parties.[265] These procedures decrease the likelihood that broadening standing to challenge Customs action would result in disclosure of confidential information.

The recommendation made here does not specifically identify the persons who could challenge Customs actions. Rather, it adopts the general standard of the Administrative Procedure Act that persons adversely affected by an administrative action may challenge that action.[266] In many instances, the firms discussed above would be considered adversely affected because they would be within the "zone of interests"[267] protected by the statutes enforced by Customs and would be injured in fact.[268] The ultimate determination of standing would be a judicial decision. This recommendation is intended to lower the procedural barriers that now prevent the operation of that judicial process.

Persons adversely affected by actions now subject to challenge under section 516 would use the administrative procedures already available. For those adversely affected by action excluding or admitting merchandise, the recommendation provides both new administrative procedures to challenge that action and subsequent judicial review. For those affected by any other final agency action, the recommendations of this Article permit suit in the Customs Court once administrative remedies are exhausted. These proposals do not attempt to articulate what those remedies would be, but instead would permit the Customs Service to design the administrative remedy most appropriate in the context of the action subject to challenge.

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[262] 19 U.S.C. § 160(d)(3) (Supp. V 1975).

[263] 18 U.S.C. § 1905 (1970).

[264] 28 U.S.C. § 2637 (1970).

[265] Cust. Ct. R. 6.1(c). *See, e.g.,* A.S.G. Indus., Inc. v. United States, No. 76-3-00667 (Cust. Ct. May 10, 1977) (order granting defendant's motion for protective order).

[266] 5 U.S.C. § 702 (1970).

[267] *See* Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970).

[268] *See also* Barlow v. Collins, 397 U.S. 159 (1970) (farmers eligible for government payments have standing to challenge validity of regulation expanding circumstances in which payments may be assigned); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) (regulations concerning national banks may be challenged by nonregulated competitors); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (general member of public has standing if he alleges "that he has been or will in fact be perceptibly harmed by the challenged agency action").

Burden of Proof in the Customs Court

Congress should amend 28 U.S.C. § 2635(a) to revise the Customs Court's standard of review in the following way: The presumption of correctness of Customs Service decisions, and the imposition upon the party challenging a decision of the burden of proving otherwise would be retained. However, the additional requirement (read into the statute by the Customs Court and the Court of Customs and Patent Appeals) that the challenging party prove not only that the Customs Service was wrong, but also what a correct decision would be, would be eliminated.

Specifically, the amended statute should provide that, if the Customs Court determines that action taken by the Customs Service is erroneous, the court will modify or set aside such action; if the court is able to determine what action is correct, it should so determine and order that the correct action be taken; if the court cannot determine what action is correct, it should remand the case to the Customs Service with instructions to take action consistent with the decision of the court. Any redetermination made by the Customs Service pursuant to a remand should be subject to a new protest or petition, and any decision by the Customs Court to remand a case should be appealable.

This recommendation is necessary to eliminate an anomaly in Customs Court judicature that precludes the court from reversing or modifying Customs Service actions found to be erroneous. A plaintiff challenging Customs action in the Customs Court has a dual burden of proof: he must first overcome a statutory presumption that the Customs action was correct, and if successful, he must prove what action would have been correct. Curiously, if the plaintiff proves only that the action of the Customs Service was incorrect, the court neither modifies the action nor remands the case to the Customs Service. Rather, the action is permitted to stand unless the plaintiff also proves what the correct action should have been. As a result, even after Customs Court review admittedly incorrect Customs action often remains uncorrected under this system.

The origins of the dual burden of proof are obscure. The presumption of correctness of Customs actions arises from 28 U.S.C. § 2635(a), which provides that in matters before the Customs Court: "The decision of the Secretary of the Treasury, or his delegate, is presumed to be correct, and the burden to prove otherwise shall rest upon the party challenging a decision." Although the Court of Customs and Patent Appeals has cited this provision as authority for requiring the party challenging Customs action to prove the correct decision as well,[269] in fact the dual burden of proof had been judicially imposed before this provision was enacted in 1930. The Tariff Act of 1909 instructed the Board of General Appraisers (the precursor of the Customs Court) to "proceed by all reasonable ways and means in [its]power to ascertain, estimate and determine the dutiable value of the imported merchandise, and in so doing [to] exercise both judicial and inquisitorial functions."[270] Because the Act contemplated that the Board would make its own determination rather than simply review the determination of Customs, the Board assigned the importer the burden of supporting a final determination.[271] The Board did not alter this procedure when it became a court of review in 1922.

Several cases illustrate the inequity of placing this dual burden of proof on the plaintiff.[272] Proof of valuation and classification is too difficult to require it as a prerequisite for the successful challenge of Customs decisions. For instance, a plaintiff required to prove "usual general expenses" may not have access to the information necessary to prove the expenses incurred by foreign exporters. Similarly, proof of "United States value" would require proof of the price at which such or similar merchandise (not just that of the importer) is freely sold in the United States, plus proof of proper allowances for "usual" commissions or profits, the "usual" cost of transportation, and similar factors. Proving these dollar amounts can be an exceedingly difficult task.[273] The unfairness of the rule is increased by the fact that Customs itself need only "estimate" on the basis of the best available evidence.[274] An additional consideration is that Customs often has readier access to the necessary information than does the importer.[275]

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[269] Hayes-Sammons Chemical Co. v. United States, 55 C.C.P.A. 69 (1968); Minkap of California, Inc. v. United States, 55 C.C.P.A. 1 (1967); United States v. Acme Steel Co., 51 C.C.P.A. 81 (1964); Kobe Import Co. v. United States, 43 C.C.P.A. 136 (1956). Moreover, although Customs may estimate the amount of duties on the basis of reasonable evidence, the plaintiff must prove every material issue by a preponderance of the evidence in order to satisfy his burden. Globemaster Midwest, Inc. v. United States, 337 F. Supp. 465 (Cust. Ct. 1971); Park Ave. Imports v. United States, 299 F. Supp. 528 (Cust. Ct. 1969).

[270] Tariff Act of 1909, ch. 6, § 28(13), 36 Stat. 11 (1909).

[271] *Id. See* United States v. Edsen Keith & Co., 5 Ct. Cust. App. 82 (1914).

[272] In Dana Perfumes, Inc. v. United States, 524 F.2d 750 (C.C.P.A. 1975), the Court of Customs and Patent Appeals found that Customs erroneously calculated the cost of production of imported merchandise by including the usual general expenses—or overhead—of selling in the country of exportation, rather than including (as it should have) the usual general expenses incurred for products to be exported. Because the importer could not prove the amount of usual general expenses for exports—which would have required the importer to prove expenses incurred by other exporters—the erroneous Customs decision was affirmed. Cases of this type are not uncommon. *See, e.g.*, United States v. T.D. Downing

Because of the dual burden of proof, importers and U.S. competitors are inhibited from challenging Customs decisions, thus reducing the effectiveness of judicial review in assuring that Customs decisions are correct and fair. Since there is no good reason for requiring the party challenging Customs action to prove what the correct action should be, the rule should be changed. If after trial the Customs Court lacks the information necessary to determine the correct action, it can remand the case to Customs. Customs then can ascertain the necessary additional facts as it normally does

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Co., 20 C.C.P.A. 251 (1932) (prior to 1955 amendments to valuation standards, importer must prove foreign value and export value, or that one was nonexistent, in order to show which is preferred). *See also* Brooks Paper Co. v. United States, 40 C.C.P.A. 38 (1952) (plaintiff must establish usual wholesale quantities in which such or similar merchandise was freely offered). Similarly, importers have demonstrated that the classification made by Customs was erroneous, but have lost by failing to demonstrate the correct classification. United States v. Enrique C. Lineiro, 37 C.C.P.A. 5 (1949); New York Credit Men's Adjustment Bureau, Inc. v. United States, 314 F. Supp. 1246 (Cust. Ct. 1970).

[273] The evidence needed to prove the value of merchandise is often in the exporter's files and may be inaccessible to the importer.

[274] *See* note 47 *supra* and accompanying text.

[275] The dual burden of proof is not always difficult for the plaintiff to satisfy. When the same evidence can be used both to show that the Customs action was wrong and to establish the plaintiff's contentions, there is effectively a single burden of proof on the plaintiff. Thus, where the imports could be classified under one of two possible classifications, proof that Custom's classification is in error may also demonstrate that the classification relied upon by the importer is correct. *See* Associated Metals & Minerals Corp. v. United States, 426 F. Supp. 568 (Cust. Ct. 1977). Or, if the only issue is whether a buying commission is *bona fide* (in which case it is not included in value), the same evidence used to rebut the presumption that Customs correctly decided the issue also may establish that the buying commission was *bona fide*.

(by all "reasonable means"), making a new administrative determination, which again would be presumptively correct and subject to a protest or petition.

The recommendation here would preserve the presumption of correctness underlying action of the Customs Service, but would give the Customs Court authority either to modify or reverse the action, and to remand the proceeding to the Customs Service for a new determination. It is expected that the court would use its remand authority flexibly; were the necessary facts readily available, the court might order the parties to produce them so that the court could make a final determination without remand. Often the parties themselves might introduce evidence facilitating a final decision, or the Service might avoid remand by making alternative findings at the administrative level.

The proposed change specifies that the court may determine what action is correct. This would enable the court to make findings which were more detrimental to the plaintiff than the original Customs decision. The court might, for example, find a classification which bore a higher rate of duty than the classification relied on by Customs or the plaintiff. Although some have argued that this threat of an adverse Customs Court decision might chill the interest of potential plaintiffs in judicial review, the rule contained in the recommendations seems appropriate since it attempts to ensure that correct determinations will be made.

Finally, the recommendation provides that a remand order of the Customs Court would be appealable to the Court of Customs and Patent Appeals. That court now has jurisdiction to review any "final order" of the Customs Court, but it is not clear whether this would by itself enable immediate review of remand orders;[276] the proposal would make this explicit. Such review is necessary to protect the right of the government to have decisions of the Customs Court reviewed. Without it, if on remand the Customs Service made a determination with which the plaintiff agreed, there could be no appeal and no means of having the remand decision reviewed. Therefore, immediate review of the remand decision should be permitted.

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[276] Circuit courts have split on whether their authority to review a district court's "final order," 28 U.S.C. § 1291 (1970), includes authority to review a district court order remanding a case to an administrative agency for further consideration. *Compare* Gueory v. Hampton, 510 F.2d 1222, 1224–25 (D.C. Cir. 1974) (remand order to Civil Service Commission appealable as a "final order") *and* Cohen v. Perales, 412 F.2d 44, 48 (5th Cir. 1970), *rev'd on other grounds sub nom.* Richardson v. Perales, 402 U.S. 389 (1971) *with* Pauls v. Secretary of the Air Force, 457 F.2d 294, 297–98 (1st Cir. 1972) *and* United Transport Union v. Ill. Cent. Ry., 433 F.2d 566, 568–69 (7th Cir.), *cert. denied,* 402 U.S. 915 (1970).

Review of Decisions to Exclude Merchandise

Merchandise entered through Customs control may be excluded from the United States in a variety of ways and for a variety of reasons. Customs may refuse to release the merchandise, seize the merchandise, or demand redelivery of merchandise already released. The decision to take such exclusionary action may be made by Customs personnel or by personnel of another agency.

Exclusion cases raise a multiplicity of issues. The recommendations made here address two: availability of timely review by the Customs Court, and exclusion under the trademark and copyright statutes.

1. *Expedited Review*

Congress should amend the statutes giving preference to certain types of cases in the Customs Court, 28 U.S.C. § 2633, and the Court of Customs and Patent Appeals, 28 U.S.C. § 2602, to ensure a similar preference for cases properly before either court involving exclusion of merchandise from entry or delivery.

There is justification for Customs continuing the present practice of holding merchandise pending an exclusion decision. Congress has prohibited some goods from entering the United States because of a legislative determination that use or circulation of the goods within the United States would be harmful; release of goods pending an exclusion decision would jeopardize the interests Congress intended to protect. Moreover, because all merchandise must go through import processing, it is convenient to have Customs ensure that the merchandise meets regulatory standards.[277]

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[277] Sometimes the practice of first holding or seizing merchandise and later deciding whether it should be excluded results in inconsistent treatment between imported merchandise and domestic merchandise. For example, the owner of a U.S. trademark cannot enjoin a domestic firm from infringing the trademark without first demonstrating to a court (at least in a preliminary hearing) the validity of his trademark and the fact of infringement. However, he can effectively enjoin allegedly infringing imports merely by convincing Customs of the infringement and having the merchandise detained and seized. Similarly, an imported article allegedly infringing a copyright may be seized (even from the importer's customer) prior to adjudication of the fact of infringement; a domestic article could not be. *See, e.g.*, Foreign & Domestic Music Corp. v. Licht, 196 F.2d 627 (2d Cir. 1952) (imported article infringing copyright can be seized even if in third party's hands, but infringing

However, unless the procedures for securing administrative and judicial review of a decision to exclude or seize merchandise are timely, it is often extremely prejudicial to hold the goods pending a decision. Imports may be perishable or seasonal merchandise, or the importer may need the merchandise to fulfill production or marketing commitments. In such instances, even temporary exclusion may have a permanent and irreparable effect on the importer. Moreover, issues surrounding exclusion should be dealt with promptly to enable importers to make future purchasing and shipping plans knowledgeably.

Administrative and judicial decision-making processes now used in exclusion cases are sometimes inadequate. Exclusion of merchandise under a customs law can be protested immediately and will be reviewed by Customs within 30 days after the protest is filed. However, no procedures protect against irreparable injury while decisions are being made and reconsidered or permit the Customs Court to review the decisions expeditiously. As one prominent customs attorney has said: "There is no way to get speedy judicial review when speed is essential if the review is to be effective."[278]

This proposal, coupled with the previous recommendations to authorize the Customs Court to exercise the remedial power of district courts, should enable the Customs Court to provide a forum within which disputed issues in exclusion cases under its jurisdiction can be speedily resolved.

2. *Customs Service Authority Under the Trademark and Copyright Statutes*

Congress should amend the statutes under which the Customs Service is authorized to detain and seize merchandise that allegedly infringes a trademark, 19 U.S.C. § 1526, or copyright, 17 U.S.C. § 603, to provide that the Customs Service may take no such action until the owner of the trademark or copyright obtains an order in the district court enjoining the importation. Alternatively, Congress should amend the trademark statute, as it has the copyright statute, to authorize the Customs Service to establish by regulation such a condition precedent to its acting to detain and seize

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articles which are domestic cannot be so seized). This consideration influenced the recommendation below that Customs be divested of authority to exclude merchandise for trademark and copyright infringement.

[278] Address by George Bronz, Second Judicial Conference of the U.S. Court of Customs and Patent Appeals (May 29, 1975), *reprinted in* 69 F.R.D. 119, 182 (1976).

allegedly infringing merchandise, and the Customs Service should promulgate such a regulation. In any event, the Customs Service should adopt express procedures that would enable the owner of a trademark or copyright to identify imported merchandise that may infringe his mark or copyright.

There are several reasons for this recommendation. First, as already noted, the detention and seizure of such merchandise by Customs places imported merchandise in a different position from domestically produced merchandise. No government agency enforces trademark or copyright laws against domestic merchandise; domestic merchandise is not detained or seized because a government employee believes it infringes a U.S. trademark or copyright. The owner of a trademark or copyright who wishes to enjoin commerce in allegedly infringing domestic merchandise must first prove the infringement and the validity of his trademark or copyright in court.

The different treatment of imported merchandise is harmful and unjustified. Importers risk substantial delays because of decisions made by an import specialist. In effect, the importer can be enjoined from dealing in his merchandise even before there is an adjudicated decision concerning the infringement claim. Moreover, owners of U.S. trademarks have ample incentive and ability to protect their own interests. Unlawful importation can be enjoined, and importers can be sued for damages resulting from past unlawful importations.[279]

Congress has recognized that under the copyright act "[t]he Customs Service is often in no position to make determinations as to whether particular articles are piratical."[280] As a result, Congress has given the Treasury Department authority to require by regulation that the person seeking exclusion either obtain a court order enjoining importation or furnish proof of his claim and post a bond to cover damages resulting from Customs' unjustified detention or exclusion of merchandise.[281] Similar considerations influence the recommendation concerning the action Customs takes under the trademark act. The expertise of the Customs Service is not geared toward deciding the sensitive issues surrounding possible consumer confusion in trademark disputes, and Customs' decision-making in such disputes cannot encompass all of the substantive questions that need to be examined. For example, when deciding whether imports infringe a registered trademark, Customs has no authority to consider the validity of the trademark registration. As a result, in at least one case Customs has seized and destroyed merchandise for allegedly infringing a trademark even though the trademark did not qualify for registration and was therefore not entitled to protection.[282]

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[279] There is some risk that foreign exporters desiring to sell infringing merchandise in the United States (and not themselves subject to suit in the United States) could avoid liability by dealing through importers who would be judgment proof. This appears to be an unlikely occurrence, and an acceptable risk that can be minimized through effective enforcement of judgments.

[280] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 171, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659, 5787.

[281] General Revision of Copyright Law, Pub. L. No. 94–553, § 101, 90 Stat. 2541 (1976) (to be codified at 17 U.S.C. § 603).

Imposition of Civil Penalties

The means by which the Customs Service assesses and collects civil penalties, particularly under section 592 of the Tariff Act of 1930, have been under attack for a number of years.[283] Knowledgeable observers have correctly noted the "unfairness and obsolescence"[284] of this "antiquated"[285] provision that leads to "arbitrary and irresponsible behavior."[286]

David R. Macdonald, then Assistant Secretary of the Treasury, referred to "the Section 592 magnum," combining the qualities of a "Gatling gun and a 10-pound smooth bore cannon." The only problem with using section 592, he said, "is that sometimes it's difficult to identify the victim afterwards."[287] It is easy to see why. The statutory penalty for section 592 violations is usually disproportionate to the nature of the conduct and degree of culpability involved and to the revenue deficiency or other injury resulting from the violation. The mitigation procedure is intended to ameliorate the harsh effects of the statutory penalty, but instead it shields the administrative action of penalty assessment from judicial review.[288] Persons against whom a penalty is assessed by Customs virtually always accept a mitigated penalty and thus forego judicial review. As a result, Customs is not held accountable through the judicial review process for what it does.

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[282] *See* Platilite Corp. v. Kassnar Imports, 508 F.2d 824 (C.C.P.A. 1975) (following seizure and destruction of merchandise bearing allegedly infringing mark, the trademark alleged to have been infringed was found to be invalid).

[283] For a discussion of enforcement of section 592, see text accompanying notes 111–34 *supra*.

[284] Dickey II, *supra* note 112, at 694.

[285] *Modernization Act Hearings, supra* note 9, at 188 (statement of Robert E. Herzstein).

[286] American Importers Ass'n, Why Customs' Penalty Statute (Sec. 592) Must be Changed! (unpublished position paper on file with the Administrative Conference of the United States).

[287] Address by David R. Macdonald, Ass't Secretary of the Treasury, before the American Importers Ass'n (Sept. 10, 1974), *reprinted in* U.S. Dep't of Treasury News Release (Sept. 10, 1974).

There are many proposals for the reform of section 592.[289] The recommendations below articulate a number of principles for its reform.[290]

1. *Penalties*

Section 592 should be amended to provide for civil money penalties against the person violating the statute rather than for forfeiture of the merchandise or the full value thereof. Congress should establish maximum penalties based upon the revenue deficiency, if any, resulting from the violation, and upon the degree of culpability of the violator. In any case in which the violation does not result in a revenue deficiency, the maximum penalties should be based upon a portion of the value of the imported merchandise and upon the degree of culpability of the violator. If the violator is an importer, he should be given the option of surrendering his merchandise in lieu of payment of any penalty assessed.

The first principle of these recommendations is that section 592 should be revised so that forfeiture of merchandise, or its full value, is no longer the penalty for section 592 violations. Establishing penalties based upon the value of merchandise means that penalties often bear no relation to the conduct constituting the violation or to the culpability of the violator. This leads to unequal treatment: for example, two persons who separately misstate the invoice price of imports would be subject to differing penalties solely because the value of their merchandise is different. It also leads to denial of judicial review: the assessed penalty often is so disproportionate to the violation that companies may feel compelled to accept mitigation offered by the Customs Service rather than take the risk of seeking judicial review. Therefore, forfeiture should be dropped as a sanction for section 592 violations.

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[288] *See generally* Dickey I, *supra* note 112; Dickey II, *supra* note 112; Herzstein, *supra* note 112.

[289] *See, e.g.*, Dickey II, *supra* note 112, at 729. In addition, the Chamber of Commerce of the United States, the American Importers Association, and many other persons and organizations have proposed reforms. The recommendations made here are similar to provisions of legislation now before the House of Representatives.

[290] The recommendations do not address several issues raised by other proposals to reform section 592, *e.g.*, the definition of conduct that violates section 592; the applicable statute of limitations (*see* 19 U.S.C. § 1621 (1970)); and reduced penalties for the voluntary disclosure of violations. *See* 19 C.F.R. § 171.1 (1977).

It is also recommended that the penalty in section 592 be stated as a maximum amount rather than a fixed amount, and that the court reviewing the penalty assessment should have the authority to determine independently the amount of penalty to be imposed. Penalties in fixed amounts for prohibited conduct have some advantages over maximum penalties; they are predictable and uniform and avoid problems of disparity in the sanctions applied in different cases.[291] For these reasons the Administrative Conference of the United States rejected, in its study of penalties imposed by the Internal Revenue Service, the idea that IRS penalty statutes should contain maximum penalties and recommended instead that penalties be in a fixed amount.[292] However, there is no standard model to follow; penalties are sometimes fixed by statute and sometimes determined by the decision-maker within maximum penalties established by statute.[293]

In the context of section 592, penalties in fixed amounts would be unwise because often they would be disproportionate to the violation. Conduct challenged under section 592 varies widely. Violations of section 592 include misstatements of: the invoice price of the merchandise; its quantity or weight; and its country of origin. Each may result from different motivations, require different degrees of volition or subject the violator to different risks of detection. In addition, the culpability of the violator is often a matter of degree. Even negligent conduct—the failure to adopt procedures reasonably designed to ensure that mistakes do not occur—is not a single concept, but can embody various degrees of culpability depending upon the circumstances.

Many mitigating and aggravating circumstances should be taken into account so that penalties reflect the seriousness of the violation. The Customs Service lists the following seven factors it considers when ruling on petitions for mitigation: the fact that loss of revenue from the violation is small in relation to the forfeiture value; contributory error by a Customs employee; cooperation of the offender in the investigation; inexperience in importing; remedial action taken after the violation was discovered, including rectification of any revenue deficiency resulting from the violation; prior good record; and inability to pay.[294] It also lists several aggravating factors: conduct impeding the investigation; previous record of a violation; or experience in importing.[295] Regardless of the relevance of, or the weight to be given to, these particular factors, it is clear that many variables determine the seriousness of any section 592 violation.

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[291] *See* Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 Wash. U.L.Q. 265, 276; Goldschmid, *Report in Support of Recommendation 72–6: An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 Recommendations and Reports of the Administrative Conference of the United States 896, 942 (1972).

[292] Administrative Conference of the United States, Administrative Procedures of the Internal Revenue Service, S. Doc No. 266, 94th Cong., 2d Sess. 646–49 (1975) [hereinafter cited as IRS Report].

[293] *Compare* I.R.C. § 6653 (penalties in fixed amounts for civil fraud, negligence, and intentional disregard of rules or regulations) *with* Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819(a)(1) (1970) (maximum penalties). Over half the penalties administered by federal agencies provide for variable or maximum penalties. Goldschmid, *supra* note 291, at 957–64.

As a result of the many variables in section 592 cases, it would be virtually impossible to establish fixed statutory penalties to reflect all of the different elements that should be taken into account in determining an appropriate sanction. Therefore, the fixed penalties, unless mitigated by administrative discretion, would be inequitably high in some cases; in other cases they would be ineffective as a deterrent.

Moreover, with penalties in fixed amounts the Customs Service would continue to be able to shield its administrative determinations from judicial review by making a mitigation offer the alleged violator would accept in order to avoid the fixed penalty which would be imposed if the finding of a violation were upheld by a reviewing court. This power of "administrative blackmail" makes the present enforcement of section 592 unfair and should not be continued.

For these reasons, Congress should enact a maximum penalty, and should authorize the court reviewing section 592 assessments to make an independent determination of the amount of the penalty to be imposed. Maximum penalties for section 592 violations will be most realistic and effective if they are based upon some multiple of the loss of revenue to the government ensuing from the violation. This is true because such loss measures both the injury to the government from the violation and the benefit of the prohibited conduct in question to the violator. Such penalties deter violations and compensate the government for losses and risks of undetected violations. Determining the multiple of the loss of revenue that should be established as a penalty will require careful examination of the difficulty of detecting violations and the deterrent effect of various penalty amounts. Congress could consider the multiples of revenue deficiency now used by Customs in mitigating penalty assessments as a starting point for its analysis of these questions.

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[294] 39 Fed. Reg. 39,061 (1974). Customs also lists as a "mitigating" factor the "probable difficulty in collecting because offender is outside the jurisdiction of the United States." Although practicality may induce Customs to mitigate penalty assessments in order to collect something on assessments that would otherwise be uncollectible, this does not seem to be a "mitigating" factor as that term is generally used.

[295] *Id.* at 39,062.

It is recommended that the penalties under section 592 be established for three degrees of culpability.[296] This is necessary because often conduct may be intentional (*i.e.*, with knowledge that underpayment of duties will result) or reckless (*i.e.*, with disregard of a substantial risk that underpayment will result) without being severe enough to warrant a heavy penalty for fraudulent conduct.[297] In such cases, a middle category of defined culpability will help to ensure that the sanction fits the violation.

A small percentage of section 592 proceedings involve violations which harm the interests Customs is charged with protecting, but do not cause a loss of revenue. This occurs, for example, when a false or fraudulent practice enables an importer to avoid a quota restriction, but the importer pays the proper duty on the merchandise. In such cases it is difficult to establish a statutory penalty that compensates the government for injury to its interests and also deters violations. In order to promote certainty and flexibility in setting the penalty, the recommendation would provide that when there is no loss of revenue to the government the maximum penalty would equal some portion of the value of the imported merchandise. This would reduce the coercive impact of the present forfeiture penalty while maintaning a high penalty as a deterrent.

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[296] This proposal is derived from the recommendations of the Administrative Conference of the United States concerning penalties imposed for understatement of federal income taxes. *See*Recommendation 75–7 of the Administrative Conference of the United States, 41 Fed. Reg. 3981, 3984–85 (1976), 1 C.F.R. § 305.75–.77 (1977). There, three degrees of culpability—negligence, reckless or intentional conduct, and fraud—were found to be necessary. With only two standards of culpability (one for negligent conduct and one for fraudulent conduct) "a surprisingly broad range of conduct is covered by the negligence penalty. Intentional misstatements are often penalized with the same degree of harshness as mere negligence. Such whimsical and unequal results are probably quite different from what Congress intended." Report on the Administrative Procedures of the Internal Revenue Service, *supra* note 281, at 641.

[297] The Customs Service already employs three standards of culpability in deciding whether to mitigate assessed penalties: negligence, gross negligence, and fraud. 39 Fed. Reg. 39,061 (1974).

The recommendation also provides the alleged violator of section 592 with the option of surrendering the imported merchandise in lieu of paying the statutory penalty. This will occur rarely, because in most circumstances the value of the merchandise to the alleged violator will be very much greater than the potential monetary penalty. This option is necessary, however, because of peculiarities in the appraisement of merchandise. An imported manuscript for a book, for example, may be appraised at a value which includes the value of the research undertaken to write the book. In such cases the appraised value of the merchandise, and thus the potential loss of revenue, is greatly disproportionate to the value of the merchandise to the importer. Accordingly, the option allowing the violator to surrender the merchandise will ensure that penalties based upon loss of revenue are not themselves disproportionate to the violation.

2. *Administrative Procedures and Judicial Review*

The Customs Service should have the authority to assess and to mitigate civil penalties. If an assessment is contested, action by the government to enforce a penalty should be in the Customs Court. In such an action, the government should have the burden of proving the act or omission constituting a violation and, if so alleged, the intentional nature thereof. The Customs Court should be authorized to determine de novo *the amount of the penalty.*

It is recommended that the Customs Service maintain the penalty assessment and mitigation procedures it uses now. If an assessment is contested, the Service should be required to bring an enforcement action in a court. Customs' informal administrative procedures enable it to dispose of large numbers of cases without unnecessary procedural burdens. At the same time, procedural fairness should be guaranteed to alleged violators through full judicial review. The Administrative Conference of the United States has recommended that civil money penalties be assessed in most cases through adjudicatory procedures at the agency level.[298] The proposal here, while it deviates in form from that recommendation, is consistent with the basis of the recommendation—that assessing and collecting penalties would be facilitated if the agency were not required to initiate assessment actions in a federal district court. Since the Customs Court is a specialized court with expertise in the underlying substantive issues, many of the factors normally supporting adjudication at the administrative level support adjudication of Customs penalty cases in the Customs Court.[299]

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[298] *See Recommendation 72–6: Civil Money Penalties as a Sanction,* 2 REPORTS AND RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 67 (1973).

A significant issue raised by proposals to reform section 592 is whether government enforcement actions[300] under section 592 will be brought in a district court, in the Customs Court, or both. Most other proposals for the reform of section 592 contemplate that such actions will continue in the district court,[301] although another possibility would involve concurrent jurisdiction in the Customs Court and district courts. Under the latter option, cases could be brought in the district court, but the defendant would have the option of transferring the case to the Customs Court under procedures patterned after those used in removing a suit from a state to a federal court.[302] The recommendation of this article would place exclusive jurisdiction over penalty cases in the Customs Court.

Three factors support this arrangement, although there are countervailing considerations. First, the Customs Court has more experience than district courts with the issues that often arise in section 592 proceedings. Although questions of fact can be decided with equal ease by the Customs Court and district courts, the resolution of section 592 issues often requires interpretation and application of the customs law, a function that in nonpenalty cases is generally performed exclusively by the Customs Court.[303] Such issues frequently arise in section 592 proceedings, and adjudication in the Customs Court should facilitate and ensure consistency in the resolution of these issues.

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[299] Thus, crowding of district court dockets is not a factor favoring administrative adjudication in this instance. The need for specialized knowledge and expertise, the degree to which issues of law are likely to arise, the importance of consistency of outcome, and the likelihood that an agency will establish an impartial forum—factors mentioned by Professor Goldschmid in his report, *supra* note 291 at 932–33—all support adjudication in the Customs Court.

[300] The term "government enforcement actions" is used because this Article does not consider whether the Customs Service should be authorized to directly enforce section 592 in court without relying, as it now does, upon Department of Justice enforcement actions.

[301] This is true of both H.R. 8149 and H.R. 8367, 95th Cong., 1st Sess. (1977), as well as the proposals advanced by the American Bar Association, the Chamber of Commerce of the United States, and the American Importers Association. Most of these private groups, however, appear not to have focused on which forum is most appropriate for the review of section 592 cases.

[302] The procedures for removing a case from a state to a federal court are in 28 U.S.C. § 1446 (1970).

[303] The Customs Court is best able to decide, for example, whether blueprints given by an

A second factor favoring enforcement of section 592 in the Customs Court is the likelihood that it will impose more uniform penalties. With enforcement in district courts, cases would be brought before judges throughout the country, each judge would hear few cases, and judges would not be familiar with decisions made by other judges. By contrast, centralizing the decision-making in one court with a small number of judges would facilitate (although not necessarily ensure) the development of a consistent judicial consensus concerning penalties to be imposed.

The third factor favoring Customs Court enforcement of section 592 is that the Customs Court can assure speedier adjudication because its docket is less crowded than the dockets of the district courts. Indeed, the underutilization of the resources of the Customs Court suggests that it could assume at least some new responsibilities without need for additional resources.[304] Thus, enforcement of section 592 in the Customs Court would promote a better allocation of judicial resources.

Two potential drawbacks to enforcing section 592 in the Customs Court can be overcome. The first is that the Customs Court sits primarily in New York City while district courts may be more accessible to persons at ports in other cities. However, the Customs Court is authorized to hold trials at any place within its jurisdiction and does sit at trials in many places.[305] The judges of the Customs Court can "ride circuit," ensuring that those subject to section 592 proceedings are not unduly prejudiced by the location of a trial. Although this would involve some delay in scheduling trials, the delay is likely to be shorter than the delay attendant upon litigation in a district court.

The second potential drawback is that in the Customs Court issues of fact are decided by a judge, not a jury. Some defendants in section 592 cases may feel the loss of a right to a jury trial to be significant. It seems clear that the constitutional guarantee of a

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importer to a foreign supplier should have been declared as a dutiable "assist" and whether the failure to make such declaration violates section 592. Similarly, questions concerning the declaration of "selling commissions" and interpretations of other intricate customs laws and regulations raise issues which by experience the Customs Court is best suited to handle.

[304] *See* notes 208–09 *supra* and accompanying text.

[305] 28 U.S.C. § 256 (1970).

right to a jury trial does not extend to enforcement proceedings brought by the government to assess or collect civil penalties. Recently, in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,*[306] the Supreme Court held that:

> in cases in which 'public rights' are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the fact-finding function and initial adjudication to an administrative forum with which the jury would be incompatible.[307]

Because section 592 suits are brought by the government in its sovereign capacity to enforce a "public right," Congress could assign the fact-finding function in section 592 proceedings to an administrative tribunal, and *a fortiori* to a federal judge without a jury.

A more difficult question is whether Congress *should* make jury trials available in section 592 proceedings even though the Constitution does not require it to do so. It is not necessary to decide that question, however, to determine that the Customs Court is the preferred forum. In view of the advantages the Customs Court offers for section 592 enforcement, should it see fit to do so, Congress could authorize the Customs Court to empanel juries for that purpose.

Under present law, when the government sues to recover a penalty under section 592 (or any of the other penalty provisions enforced by Customs) it need only show probable cause for the institution of the suit. If it does so the penalty is imposed unless the respondent proves that the statute was not violated.[308] In view of the informal administrative process used by Customs to determine whether section 592 has been violated,[309] this rule is unsatisfactory. It shields the administrative determination from review by requiring alleged violators to assume the difficult burden of demonstrating that an alleged act did not occur.

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[306] 97 S. Ct. 1261 (1977).

[307] *Id.* at 1266. This conclusion was reached by some scholars even before the *Atlas Roofing* decision. *See, e.g.,* Goldschmid, *supra* note 291, at 943.

[308] 19 U.S.C. § 1615 (1970). *See, e.g.,* United States v. One 1971 Chevrolet Corvette Auto, 496 F.2d 210 (5th Cir. 1974); United States v. Fields, 425 F.2d 883 (3d Cir. 1970).

[309] *See* notes 121–32 *supra* and accompanying text.

The proper allocation of the risk that the trier of fact, faced with conflicting reasonable inferences, will doubt the inference asserted by a party, depends on considerations of fairness, convenience, and policy.[310] The party seeking to change the present state of affairs or impose a sanction normally bears the risk of nonpersuasion.[311] This is generally desirable because it reduces the chance that the status quo will be changed or the sanction imposed erroneously. The risk may also be imposed on the party who contends that the more unusual event has occurred,[312] and is often allocated to avoid requiring a party to prove a negative—so that a party need not prove that an act did not occur.

Based upon these factors, it is recommended that in proceedings to enforce section 592 the government have the burden of proving the acts constituting the violation and, if it seeks penalties for intentional (*i.e.*, non-negligent) conduct, that the acts were done intentionally.[313] This should be required because in section 592 cases the government seeks to impose a heavy penalty. As long as the penalty assessment is based upon informal procedures the government should bear the burden of proof so that the facts underlying the assessment are subjected to full and impartial scrutiny. The burden of proving that conduct was intentional is not unduly severe, since such conduct generally requires an overt act (*e.g.*, double invoicing) which is capable of discovery and proof.

On the other hand, if the government seeks penalties for allegedly negligent conduct, this recommendation would not require the government to demonstrate that the plaintiff failed to exercise due care. It need only prove that the false statement or practice occurred; the defendant would then have the burden of proving that he exercised due care (*i.e.*, that he employed practices reasonably designed to avoid acts of the type alleged to constitute the violation).[314] Shifting the burden of proof in this way relieves the government from proving a negative (the absence of due care) and decreases the risks that false statements will go unsanctioned because of uncertainty over the required standard of care.

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[310] IX J. WIGMORE, EVIDENCE, § 2486, at 275 (3d ed. 1940); E. MORGAN, BASIC PROBLEMS OF EVIDENCE 28 (1962).

[311] C. MCCORMICK, EVIDENCE 786 (2d ed. 1972); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 STAN. L. REV. 5, 7 (1959).

[312] C. MCCORMICK, *supra* note 311, at 787.

[313] Thus, the presumption of correctness of Customs action, 28 U.S.C. § 2635(a) (1970), would not be applicable in section 592 cases.

[314] The recommendation contemplates that proof of false statements or practices will create a rebuttable presumption that the act or practice resulted from negligence. Even if this were not explicitly stated, it is likely to happen as a practical matter in the trial of negligence cases.

This recommendation is inconsistent in one respect with a similar recommendation the Administrative Conference of the United States made concerning the enforcement of penalties by the IRS. Under that recommendation the alleged violator would have the burden of persuasion if the government sought penalties for an intentional or reckless violation,[315] primarily because "the facts concerning his state of mind are in his possession."[316] The premise supporting that approach is undoubtedly accurate, but the recommendation does not necessarily follow from the premise. Although a person knows what he intended, he should not necessarily have the burden of persuasion on that issue[317] since that would require him to prove a negative—that he did not know the consequences of his conduct.[318] In view of the high penalties which are likely to be adopted for intentional violations of section 592[319] the alleged violator should not have that burden.

3. *Publishing Standards*

In order to ensure that those subject to possible penalties under section 592 know what is expected of them under the laws administered and enforced by the Customs Service, the Service should, to the maximum extent feasible, adopt and publish standards that will guide its determinations under those laws.

This recommendation is proposed because a significant number of penalty assessments are attributable to misinterpretation of Customs requirements by the alleged violator, or failure to understand one of his duties as an importer. For example, an importer must furnish on the entry documents all information necessary to establish the value of goods. He may, however, fail to declare (as is required) the value of blueprints or drawings or other assists given to the foreign supplier, and thus submit a "false" statement to the

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[315] Recommendations 75-77 of the Administrative Conference of the United States, 41 Fed. Reg. 3981, 3984 (1976); 1 C.F.R. § 305.75-77 (1977).

[316] IRS REPORT, *supra* note 292, at 649-50.

[317] *See* J. WIGMORE, *supra* note 310, at 275; E. MORGAN, *supra* note 310, at 28.

[318] For example, under section 592 an importer charged with failing to declare an assist would have the burden of proving that he did not know that the assist should be declared.

[319] *See, e.g.*, H.R. 8149, 95th Cong., 1st Sess., § 112(a) (1977), which sets the penalty for violations resulting from gross negligence at four times the loss of revenue resulting from the violation or the domestic value of the merchandise, whichever is less.

Customs Service. Yet there are no regulations defining an assist or even stating that it must be declared. The alleged violator therefore may be penalized unfairly for violating a rule that was difficult for him to interpret or know of at all. To alleviate such problems, the Customs Service should adopt and publish standards that will guide its determination of what conduct constitutes a violation.

4. *Seizure*

The authority of the Customs Service to seize and hold merchandise under section 592 (other than prohibited or restricted merchandise) should be limited to instances where it is necessary to protect Customs' ability to collect any revenue deficiency or penalty, and the Service should be required to release the merchandise to the owner upon his provision of security for payment of that revenue or penalty. Where no such release is effected by the owner, the Customs Service should be required to release the merchandise not later than 60 days after seizure, unless the government has initiated an action in the Customs Court within that period and obtained an extension for good cause from the court. In instances where the Customs Court permits the Service to hold merchandise for sale by the Service to satisfy any revenue deficiency or penalty determined by the court, the net proceeds of such sale, after allowance for the judgment and costs of the sale, should be paid to the owner.

Seizure of merchandise is a drastic, coercive sanction, with effects usually disproportionate to the section 592 violation. The authorization for seizure in section 592 reflects the antiquated conception of section 592 as *in rem* remedy, which is no longer appropriate. Because virtually all importers (and others potentially subject to section 592) are solvent, and most do business regularly in the United States, seizure is generally unnecessary to ensure collection of penalty assessments.

The Customs Service recently amended the Customs regulations to reflect evolving practice, providing that merchandise shall only be seized for violations of section 592 if the district director is satisfied that the violator appears to be, or may soon become, insolvent; the violator or his assets appear to be beyond the jurisdiction of the United States; or for some other reason a claim for the domestic value of the merchandise would not protect the revenue.[320] This is sound practice and should be adopted in legislation.[321] The recommendations of this article would do so by authorizing the Customs Service to seize merchandise under section 592 only when the merchandise is itself prohibited from entering the country, or when seizure is necessary to protect the ability of Customs to collect any revenue deficiency or penalty. The recommendation would also require the Customs Service to release nonprohibited merchandise upon the provision of security for the payment of such revenue or deficiency. Forfeiture would not be a sanction; it would be used only when necessary to satisfy the judgment of the court. The net proceeds of the forfeiture sale, after allowance for the judgment and costs of sale, would be paid to the owner.

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[320] 42 Fed. Reg. 25,323 (1977) *corrected by* 42 Fed. Reg. 27,599 (1977) (to be codified in 19 C.F.R. § 162.41(a)(3)).

The recommendation also includes procedures to ensure that any seizure by the Customs Service under section 592—a drastic sanction based on an informal administrative determination—is subject to prompt and impartial judicial review. If the owner has not obtained the release of merchandise which has been seized, the Customs Service would be required to release the merchandise not later than 60 days after seizure unless the government initiated a collection action and obtained an extension for good cause from the court.

5. *Other Statutes*

Each of the other penalty provisions enforced by the Customs Service should be reviewed and revised where appropriate in a manner consistent with the foregoing recommendations.

Section 592 is only one of 40 provisions that authorize the Customs Service to impose civil penalties or fines, some of which have the same undesirable characteristics as section 592.[322] Penalties are often enormously high in relation to the nature of the violation or the culpability of the violator. The mitigation procedures that impede judicial review of section 592 penalty cases are used in the enforcement of the other penalty provisions as well.[323] Accordingly, the other penalty provisions should be reviewed to assess how they can be changed to better serve both the trading community and the other interests Customs is mandated to protect.

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[321] H.R. 8149, 95th Cong., 1st Sess. § 112(a) (1977), contains a similar provision. H.R. 8367, 95th Cong., 1st Sess. (1977), the proposal drafted by the Department of Treasury, does not.

[322] *See, e.g.*, 19 U.S.C. § 1586 (1970) (Customs may seize vessels unloading merchandise without a permit); *id.* § 1585 (Customs may seize vessel if its master fails to report the entry of the vessel); *id.* § 1584 (Customs may seize merchandise not included on a vessel's manifest). Although such sanctions may be appropriate when smuggling is involved, they do not seem appropriate if the conduct results from negligence.

[323] *See Procedural Reform Hearings, supra* note 14, at 241 (statement of Philip Steinberg),

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249 (statement of Wiley R. George), and 450 (statement of Independent Freight Forwarders and Customs Brokers Ass'n).

REPORT IN SUPPORT OF RECOMMENDATION 77–3

EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING PROCEEDINGS

*Nathaniel L. Nathanson**

This Committee was established to consider the problems crystalized by the opinion of the Court of Appeals for the District of Columbia in Home Box Office v. FCC dealing with ex parte communications in informal rulemaking proceedings.[1] The gist of that opinion is that once a notice of proposed rulemaking is issued pursuant to the Administrative Procedure Act (5 U.S.C. §553) there should be no oral communications between interested persons and officials of the agency dealing with the merits of the proposed rules outside the confines of public meetings or hearings conducted in accordance with public notices, and no written communications dealing with the merits of the proposed rules that are not placed in the public file or record of the rulemaking proceedings in accordance with established procedures designed to make them available for examination and rebuttal by interested persons. The rationale of the opinion is that the existence of such ex parte communications in rulemaking proceedings is inconsistent with adequate judicial review on "the full administrative record" in accordance with Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), and also inconsistent with "fundamental notions of fairness implicit in due process," citing Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959).

Insofar as this decision of the Court of Appeals purports to apply the principles of Sangamon Valley to the particular rulemaking proceedings of the FCC involved in the Home Box Office case, it is not presently a matter of general concern to the Administrative Conference of the United States. In Sangamon the Court of Appeals held that ex parte communications were inappropriate in a rulemaking proceeding that involved an amendment of the Table of Television Channel Assignment so as to transfer a VHF Channel from Springfield, Illinois, to St. Louis, Missouri, and two UHF channels to Springfield. This amendment was not required by the Federal Communications Act "to be made on the record after opportunity for agency hearing," and so the proceedings were not technically subject to sections 556 and 557 of the APA. It was, however,

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[1] This is a per curiam opinion handed down March 25, 1977, on behalf of a three-judge panel of the Court of Appeals consisting of Circuit Judges Wright and MacKinnon and District Judge Weigel. Judge MacKinnon wrote a separate concurring opinion, disagreeing only with respect to the breadth of the opinion regarding ex parte communications. Apart from the holding with respect to ex parte communications the Court held invalid the FCC rules regulating the programming of cable television as "arbitrary, capricious, and unauthorized by law." The FCC has filed a petition for certiorari. [Ed. Note: The decision has been reported at 567 F.2d 9 (D.C. Cir. 1977). Certiorari and petitions for rehearing were subsequently denied. 434 U.S. 829, 988 (1977).]

closely associated with comparative hearings then in progress to determine the allocation of the VHF channel among competing applicants. With this relationship apparently in mind the Court's opinion explained that "whatever the proceeding may be called, it involved not only the allocation of TV Channels among communities but also resolution of conflicting private claims to a valuable privilege and . . . [therefore] basic fairness requires such a proceeding be carried on in the open. . . . Accordingly the private approaches to the Commission vitiated its action . . ." 269 F.2d at 224.[2] The concurring opinion of Judge McKinnon in the Home Box Office case suggests that the parallel between that case and the Sangamon case was so strong that the principle of Sangamon could be regarded as controlling, without reliance upon the broader principles announced by the majority opinion. This was true, in his view, "because the rulemaking undeniably involved competitive interests of great monetary value and conferred preferential advantages on vast segments of the broadcast industry to the detriment of other competing business interests." Slip Opinion at p. 4. Whatever may be the merits of that view, it is plain that the majority view is not so limited. Rather its position appears to be that once any rulemaking proceeding has reached the stage of notice of proposed rulemaking, any further ex parte communications become inappropriate. This is a position of great concern to the Administrative Conference because it carries the concept of improper ex parte communications far beyond that previously entertained by the Congress, the courts and most of the federal administrative agencies.[3]

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[2] The Court in Sangamon also held that the ex parte communications permitted in that case violated the FCC's own rules. This was because in the allocation of TV channels to particular communities it was the Commission's usual practice, followed in Sangamon, to prescribe a cut-off date for filing with the Commission "written data, views or arguments," and a cut-off date for "comments or briefs in reply," with the further warning that no additional comments were to be filed without a request from the Commission or a showing of good cause. "By plain implication," said the Court, "this rule forbade submitting material to the Commission's members after time for filing with the Commission had gone by." 269 F.2d at 225. In Home Box Office, the Court's opinion also holds, albeit in a footnote, that the FCC violated its own rules, referring to notices setting time limits for public filings and adding "No additional comments may be filed unless specifically requested or authorized by the Commission." Footnote 122, Slip Opinion at pp. 92–84. Even Mr. Geller, in his brief on ex parte communications in the Court of Appeals, shrank from adopting this position. Instead he pointed out that after Sangamon the FCC had adopted the practice of specifying on a case-by-case basis the rulemaking proceedings to which the Sangamon rule would apply. In a non-Sangamon or "open" proceeding the Notice would read: "In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it in addition to the specific comments invited by this Notice." In a Sangamon or "closed" proceeding, the Notice states: "All submissions by parties to this proceeding or persons acting on behalf of such parties, must be made in written comments, reply comments, or other appropriate pleadings." In the Home Box Office proceeding, the Notices used the non-Sangamon or "open" language. Mr. Geller argued that this was a violation of the Sangamon principle, but not of the Commission's own rules. I have been advised that the FCC has generally limited the use of the Sangamon or "closed" Notice language to proceedings involving amendments of the Table of Assignment of broadcasting frequencies to particular localities, i.e., the Sangamon situation.

[3] The Court's opinion notes that the most far-reaching federal statutory provision is the amendment of §557 of the APA, enacted by Section 4(a) of the Government in the Sunshine Act of 1976 (P.L. 94–409, 90 Stat. 1241, Sept. 13, 1976), which prohibits *ex parte* communications only in proceedings subject to that provision of the APA. This amendment is consistent with the ex parte communications provisions in the procedural regulations of most of the federal administrative agencies, which in turn reflect the recommendations of the temporary Administrative Conference of the United States, 1961–1962. Selected Reports of the Administrative Conference of the United States (1963), Sen. Doc. No. 24, 88th Cong., 1st Sess., at pp. 165–205. The Conference recommendation was that:

1. The agency code should prohibit any person who is a party to, or an agent of a party to, or who intercedes in an on-the-record proceeding in any agency, from making an unauthorized ex parte communication about the proceeding to any agency member, hearing officer, or agency employee participating in the decision in the proceeding.

The opinion of the Court of Appeals seems to recognize that its position with respect to ex parte communications in §553 rulemaking proceedings may not be wholly consistent with the views generally prevailing in the past with respect to the informality legally permissible in such proceedings.[4]
Nevertheless, the opinion also defends its position as the natural, if not inevitable, consequence of recent developments with respect to both the conduct of such proceedings and judicial review on the administrative record of the proceedings. The essence of the Court's reasoning is summarized in the following paragraphs.

"Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable. Whatever the law may have been in the past, there can now be no doubt that implicit in the decision to treat the promulgation

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The term "on-the-record proceeding" was defined as follows:

> a. The term "on-the-record proceeding" should be defined as any proceeding required by statute or constitution or by the agency in a published rule or in an order in the particular case to be decided solely on the basis of an agency hearing, and any other proceeding which the agency designates by published rule or order in the particular case as subject to these prohibitions.

In commenting on this definition the accompanying Committee Report took particular note of the possible effects of the Sangamon doctrine, saying in part:

> The recommendation makes it clear that the sanctions proposed later in the recommendation should be imposed only for violations in connection with proceedings to which the agency, by published rule, or order in the particular case, has made the prohibitions and requirements of the code applicable. But as indicated in the Report, it would not be inconsistent with the Committee's recommendations if a court remanded to the agency for its further consideration any case in which it concluded that ex parte communications prejudiced the interests of a party to a proceeding to which the agency had not made the recommended prohibitions and requirements applicable because, for example, the agency mistakenly concluded that neither statute, Constitution nor the Sangamon doctrine required a decision solely on the basis of the record of an agency hearing. Sen. Doc. No. 24, supra at pp. 174–175.

It seems probable that the Sunshine Act amendment of §557 of the APA, adding §557(d), does not include the Sangamon doctrine, since it is generally assumed that Sangamon did not involve an "on-the-record" proceeding subject to sections 556 and 557 of the APA. It is possible, however, that the Supreme Court might yet hold that due process considerations, applied to a situation like Sangamon, require a hearing on the record in the same sense as Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) required a determination "on the record after opportunity for agency hearing" in deportation proceedings, thus satisfying §554(a) and triggering the application of Sections 556 and 557 of the APA. Indeed it might be said that the very concept of ex parte communications implies an "on-the-record" proceeding in a substantial sense and also in the sense of that phrase as used in Sections 553(c) and 554(a) of the APA to trigger the application of sections 556 and 557. The following statement in the House Report recommending enactment of §4(a) of the Sunshine Act would probably be cited in opposition to this position:

> The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on-the-record after an opportunity for a hearing will not be affected by the provision. H.R. No. 94–880 at p. 19; 3 U.S.C. Congressional and Administrative News (1976) at p. 2201.

[4] A footnote to the opinion cites a statement in the Attorney General's Manual on the Administrative Procedure Act to the effect that "Section 4(b) does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rulemaking proceedings." Slip opinion, footnote 118 at p. 89. The same note also states: "The Department of Justice, in apparent accord with these views, relied on the Commission's own rules which defined the administrative record to be comments and reply comments, and not the Administrative Procedure Act, in arguing that the ex parte contacts were invalid." Slip Opinion at p. 90. Discussions of the problem of ex parte communications have generally assumed that the problem arose only in adjudicatory, or on-the-record proceedings, and not in informal rulemaking proceedings. See Peck, Regulation and Control of Ex Parte Communications with Administrative Agencies, 76 Harv. L. Rev. 233, 250–256 (1962); Schwartz, Administrative Law (1976), §127, pp. 361–364; Compare, Sterling National Bank of Davie v. Camp, 431 F.2d 514, 517 (5th Cir. 1970):

Rev. 233, 250–256 (1962); Schwartz, Administrative Law (1976), §127, pp. 361–364; *Compare*, Sterling National Bank of Davie v. Camp, 431 F.2d 514, 517 (5th Cir. 1970):

> Since no formal adversary hearing is required and the Comptroller is authorized to obtain information by special commission 'or otherwise,' it is obvious that the Comptroller committed no unlawful action when he accepted and perhaps considered information sent to his office by some of the applicants, even though this was done without the knowledge of those opposing the charter.

of rules as a 'final' event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material — documents, comments, transcripts, and statements in various forms declaring agency expertise or policy — with reference to which such judgment was exercised. Against this material, 'the full administrative record that was before [an agency official] at the time he made his decision,' *Citizens to Preserve Overton Park, Inc. v. Volpe, supra,* 401 U.S. at 420, it is the obligation of this court to test the actions of the Commission for arbitrariness or inconsistency with delegated authority. *See id.* at 415–416; pages 48–52 *supra.* Yet here agency secrecy stands between us and fulfillment of our obligation. As a practical matter, *Overton Park's* mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented. Moreover, where, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly, *Citizens to Preserve Overton Park, Inc. v. Volpe, supra,* 401 U.S. at 415, 419–420; *see* K. Davis, Administrative Law of the Seventies §11.00 at 317 (1976), but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary. *See Ruppert v. Washington,* 366 F.Supp. 686, 690 (D. D.C. 1973), *aff'd by order,* D.C. Cir. No. 73–1985 (Oct. 26, 1976)." Slip Opinion at pp. 89–91.

But the opinion is not only concerned with the failure of the administrative record to disclose to the reviewing court all of the considerations that may have influenced the deliberations of the agency. It also expressed the concern that: "Even if the Commission had disclosed to this court the substance of what was said to it ex parte it would still be difficult to judge the truth of what the Commission asserted it knew about the television industry because we would not have the benefit of an adversarial discussion among the parties. The importance of such discussion to the proper functioning of the agency decisionmaking and judicial review processes is evident in our cases. We have insisted, for example, that information in agency files or consultants' reports which the agency has identified as relevant to the proceedings be disclosed to the parties for adversarial comment. Similarly, we have required agencies to set out their thinking in notices of proposed rulemaking. This requirement not only allows adversarial critique of the agency but is perhaps one of the few ways that the public may be apprised of what the agency thinks it knows in its capacity as a repository of expert opinion. [*Citing Environmental Defense Fund, Inc. v. EPH*, No. 75–2259, Nov. 10, 1976.] From a functional standpoint, we see no difference between assertions of fact and expert opinion tendered by the public, as here, and that generated internally by the agency: each may be biased, inaccurate or incomplete — failings which adversary comment may illuminate. . . . We do not understand the rulemaking procedures adopted by the Commission to be inconsistent with these views since those procedures provide for a dialogue among interested parties through provisions for comment, reply-comment, and subsequent oral argument. What we do find baffling is why the Commission, which apparently recognizes that ready availability of private contacts saps the efficacy of the public proceedings, nonetheless continues the practice of allowing public and private comments to exist side by side." (Slip opinion, pp. 91–94.)

This two-pronged rationale of the Court's position poses the fundamental question of the extent to which the developing law with respect to judicial review on the administrative record of §553 rulemaking proceedings naturally leads to the conclusion that all communications dealing with the merits of the proposed action must be included in the administrative record of the proceeding. Stated this baldly, the question would include communications from staff members to the deciding heads of the agency dealing with the merits of the proposed action and similar communications from the public occurring even before the issuance of the notice of proposed rulemaking. Presumably the Court's use of the issuance date as the pivotal point in time was based more on pragmatic than theoretical considerations; some manageable beginning point was required. Similarly the inclusion of all staff communications with respect to the merits of the proposed action might well create a record of unmanageable proportions and also unduly inhibit internal deliberations. Accepting then some pragmatic limitations on the scope of the record, the question remains whether the adversary process envisioned by the Court is the natural and appropriate consequence of judicial review on the administrative record of §553 rulemaking proceedings, or dictated by other considerations of fairness or constitutional law.

In order to probe the question further it may be helpful to consider how the problem of ex parte communications would appropriately be handled in rulemaking proceedings in the absence of judicial review on the administrative record. Ever since the famous opinion of Mr. Justice Holmes in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), it has been almost hornbook law that in general rulemaking proceedings due process does not require any opportunity for hearing at all, much less the opportunity for the adversary type of hearing lauded by the Court's opinion in Home Box Office. As Justice Holmes put it in his customary epigrammatic fashion:

> Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption. The constitution does not require that all public acts be done in town meeting or an assembly of the whole. 239 U.S. at 445.

Nonetheless, the rationale of the *Bi-Metallic* opinion has not won the approval of all commentators, especially insofar as it makes the number of people involved the determinative factor. Professor Davis in particular has urged that the appropriate test should be the character of the factual issues involved: adjudicative or particularized factual issues should be resolved in adjudicatory proceedings; general or legislative facts should be resolved in a legislative type proceedings. Davis, Administrative Law Treatise §7.06, V. 1 at 429–432 (1958). In more recent years the *Bi-Metallic* and Davis rationales have tended to merge as illustrated in Mr. Justice Rehnquist's opinion in *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973). After comparing the *Bi-Metallic* case with previous cases like *Londoner v. Denver*, 210 U.S. 373 (1908), and *ICC v. Louisville & Nashville R. Co.*, 227 U.S. 88 (1913), and subsequent cases like *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937), and *FCC v. WJR*, 337 U.S. 265 (1949), Justice Rehnquist said:

> While the line may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other. 410 U.S. at 245.

It would be an oversimplification to assume, however, that this line of cases establishing the principle that general, legislative-type rules could be issued without an adjudicatory or adversary type of hearing at the administrative level, entirely eliminated the possibility of a right to an adjudicatory hearing on disputed issues of fact in the course of judicial review of the validity of a rule. This was made clear in Mr. Justice Brandeis' opinion in *Pacific States Box and Basket Co. v. White*, 296 U.S. 176 (1935), in which the Court sustained the dismissal of a complaint challenging the validity of a state administrative regulation establishing standards for fruit and vegetable containers. In holding that the complaint was not sufficient to withstand a motion to dismiss because it set forth only conclusions rather than specific facts to support its allegations that there were no legitimate public purposes to justify the regulations, Mr. Justice Brandeis also made it clear that, if there had been adequate factual allegations, the plaintiff would have been entitled to an opportunity to establish, in a judicial trial, the truth of those allegations. This he did by quoting language from an opinion by Chief Justice Hughes to this effect:

> When such legislative action is called into question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common

> knowledge, or other matters which may be judicially noticed, or other legitimate proof, that the action is arbitrary. *Borden Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934).

In other words, although administrative regulations, like legislation, were entitled to a presumption of validity in the face of a challenge to their validity on due process grounds, that presumption did not entirely foreclose the opportunity to establish in a judicial trial the arbitrary character of the regulations.[5]

This was not the only qualification recognized in the law of the 1930's with respect to the relative immunity of administrative regulations from judicial invalidation on either substantive or procedural grounds. In the famous Morgan cases (*Morgan v. United States*, 298 U.S. 468 (1936) and *Morgan v. United States*, 304 U.S. 1 (1938)), Chief Justice Hughes characterized action taken by the Secretary of Agriculture under the Packers and Stockyards Act to establish maximum rates for all market agencies buying and selling stock at the Kansas City Stockyards, "as a proceeding of a *quasi-judicial* character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusions uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action." 298 U.S. at 480. In the first Morgan case this reasoning was used to justify an inquiry into the question whether the Administrator had indeed personally considered the evidence and the arguments. In the second Morgan case the same reasoning was used to justify a decision holding the rate order invalid on the ground that the market agencies had not been given an adequate opportunity to know and to refute the Government's final position on the matters in dispute. "Apart from what was said on its behalf at oral argument, the Government formulated no issues and furnished the appellants no statement or summary of its contentions and no proposed findings." 304 U.S. at 16. Instead: "Findings were prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the government, and were submitted to the Secretary, who signed them, with a few changes in the rates, when his order was made . . . . No opportunity was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order." 304 U.S. at 16–17. The Chief Justice regarded these proceedings just as much a violation of "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" as if "in an equity cause, a special master or the trial judge permitted the plantiff's attorney to formulate the findings upon the evidence, conferred ex parte with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections. . . ." 304 U.S. at 19–20.[6] To the argument that this was not a fair comparison because "the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry," the Chief Justice responded by saying: "It is idle to say that this was not a proceeding against the appellants when the very existence of their agencies was put in jeopardy." 304 U.S. at 20. The Chief Justice also indicated that considerations of judicial review were not irrelevant when he said: "While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding . . . places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them as shown by the findings proposed by the Bureau of Animal Industry." 304 U.S. at 21.

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[5] The correctness of this qualification, implied from Mr. Justice Brandeis opinion, is further demonstrated by the following language in Chief Justice Hughes' opinion in the Borden's Farm Products case:

> But where legislative action is suitably challenged and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are particularly the subject of evidence and findings. With the notable expansion of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions will not be reached without adequate factual support. 293 U.S. at 210.

The exact scope and appropriate effect of decisions like those in the *Morgan* cases was the subject of extensive inquiry and debate in the course of the legislative history leading up to the enactment of the Administrative Procedure Act. Some of the protagonists were concerned that rulemaking processes had been much too informal and uncontrolled either by constitutional or statutory limitations; they welcomed the *Morgan* decisions and were anxious to see their strictures solidified and extended by specific statutory restrictions. Others were concerned that the philosophy of the *Morgan* cases might be carried too far and all rulemaking proceedings turned into adversary or adjudicatory proceedings. The Report of the Attorney General's Committee on Administrative Procedure presented a carefully balanced appraisal of the considerations on both sides of this debate. They were summarized in the following passages:

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[6] It will be noticed that the Chief Justice's opinion in the second Morgan case treated ex parte communications between the administrator and his staff as equivalent to ex parte communications between a judge and one of the parties to the litigation. The APA rejected that analogy at least so far as rulemaking is concerned by confining the separation of function provisions of §554(d) to adjudication as distinguished from rulemaking and confining them still further by excepting certain types of adjudication. Nevertheless, the question whether ex parte prohibitions should apply to certain staff members as well as private parties in rulemaking proceedings has continued to be a hotly debated question. See, e.g., Report of the Administrative Conference (1962) supra, note 3 at 182; Peck, supra, note 4 at pp. 256–262. Presumably the Court's opinion in Home Box Office does not apply to intra-agency communications although that question may have to be faced if the court's general position is adopted.

Hearings in rule making are usually either investigatory or designed to permit persons who may not have been reached in a previous process of consultation and conference to come forward with evidence or opinion. The purpose is not to try a case, but to enlighten the administrative agency and to protect private interests against uninformed or unwise action.

Rule-making proceedings do occur, however, in which an adversary element is present. It may be clear in advance which interests will benefit and which will suffer if proposed regulations are issued. Low-cost producers as against high-cost producers with respect to maximum prices or minimum wages; workers as against employers with respect to wages or working conditions; buyers as against sellers with respect to the regulation of agricultural marketing; the makers of machinery which will be barred by proposed safety regulations as against others whose product will be lawful; these are recurring divisions of interested parties which from time to time confront an administrative agency engaged in rule making. Frequently the number of parties constituting a single interest is small and existing members are known. In any event, whether their number is great or small, they may often gain or lose with relative finality in the rule-making proceeding itself. The content of the regulations when issued may be definite and the consequences of noncompliance severe, such as the loss of the right to do business. Under these circumstances it may be desirable to let affected parties treat the rule-making proceedings as adversary, so that all the information, conclusions, and arguments submitted to the agency may be publicly disclosed to opposing interets which may answer, explain, or rebut. For this purpose the procedure of consultation and conference and of nonadversary hearings may be inadequate. Where this is the case, hearings, in which information is introduced as evidence subject to refutation and often to cross-examination, have come to be employed.

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The application of the procedures of a judicial trial to administrative rule making is limited, however, by the distinctive characteristics of rule-making proceedings. The issues are normally complex and numerous; the parties may be diverse and not alignable into classes; the outcome will involve a judgment concerning the consequences of rules to be prescribed for the future and a discretion in devising measures to effectuate the policies of the statute. These factors differentiate these proceedings from the normal judicial trial in which adversary hearings are traditionally employed and accordingly limit the possibility of defining issues in advance, of addressing evidence to them, of permitting systematic cross-examination, and of stating the findings and conclusions fully. The problem is evident, for example, in the case of a set of regulations which in thousands of paragraphs lays down rules for ship construction or one which governs as discretionary a matter as the nature of the disclosures to be made in a registration statement for new issues of securities.

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Even if the expense and delay of these adversary rule-making processes cannot be wholly eliminated, they may, insofar as they do not constitute a break-down of governmental regulation, purchase advantages which justify them. The ultimate judgment of whether they do or not should determine whether they are to be continued. The possible advantages are primarily those, including greater satisfaction to the parties, which result from the check to which the evidence and arguments may be subjected by counter evidence, cross-examination and argument. They include also the discipline to which the reasoning of an administrative agency is subjected when it must make findings based upon identified evidence and predicate its conclusions, in turn, upon these findings. This discipline should be self-imposed in any event within an agency's organization if not publicly; but it is not always true that it is.

These possible advantages of adversary procedure in situations involving contro-

> versial economic interests may account for the voluntary adoption of this type of procedure by a number of agencies. There are indications, on the other hand, that in some instances the use of such procedure may spring from conscious or unconscious adoption of trial methods in rule making by agencies which also have cases to hear and decide or from a supposed necessity imposed by Supreme Court decisions or public sentiment relating to the administrative process. Except insofar as binding procedural requirements actually exist with respect to rule making, the adoption of adversary methods should be governed wholly by realistic considerations. Final Report of the Attorney General's Committee on Administrative Procedure (1941), Sen. Doc. No. 8, 77th Cong., 1st Sess., at pp. 109–111.

The Administrative Procedure Act as originally enacted substantially reflected the attitude expressed in the foregoing passages of the Report of the Attorney General's Committee. Formal adversary hearings, i.e., hearings conducted in accordance with §556 and §557 — were required with respect to rulemaking only when otherwise mandated by statute or by due process, in accordance with the interpretation adopted in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1951). In other instances, the only procedural requirements with respect to rulemaking were those stated in §553. The requirements were two-fold: (1) publication of a "general notice of proposed rule-making", and (2) an opportunity for "interested persons to participate in the rulemaking." The notice was required to contain only "(1) a statement of the time, place and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." The opportunity to participate was further defined to include "submission of written data, views, or arguments with or without opportunity for oral presentation." Conceivably this could have been interpreted to mean that all submissions, whether written or oral, were to be included in a public file to be available to the general public for inspection. There is, however, no affirmative support for this interpretation in the legislative history, nor was there any early practice by the agencies to conform with such an interpretation. The Attorney General's Manual on the Administrative Procedure Act certainly gave support to a contrary interpretation by saying: "Such informal rulemaking procedure may take a variety of forms: informal hearing (with or without a stenographed transcript), conferences, consultation with industry committees, submission of written views, or any combination of these." Manual at p. 31. The assumption underlying this sentence seems to have been that conferences or consultations might be private or public in the discretion of the agency. This assumption is further substantiated by the following comment: "It is entirely clear, however, that §4(b) does not require the formulation of rules upon the exclusive basis of any "record" made in informal rulemaking proceedings. Senate Hearings (1941) p. 444. Accordingly, except in formal rulemaking governed by §7 and §8, an agency is free to formulate rules upon the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rulemaking proceedings." Manual at pp. 31–32. The only other relevant provision of §553 is the requirement that: "After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." Thus §553, both on its face and in the light of its history and contemporaneous interpretation, seems to be entirely consistent with a permissive use of ex parte communications.

With respect to proceedings conducted in accordance with §556 and §557, on the other hand, the APA seems to suggest an opposite conclusion at least with respect to matters relating to substantive decision making. This is particularly indicated by the provisions of §556(e):

> (e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding constitute the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Even so there was no explicit general ban on ex parte communications in the original APA. Section 554(d) contains a partial prohibition but this is limited to an "employee who presides at the reception of evidence pursuant to §556 of this title." It provides that: "Except to the extent required for the disposition of ex parte matters as required by law, such an employee (1) may not consult a person or a party on a fact in issue, unless on notice and opportunity for all parties to participate." It is also inapplicable "in determining applications for initial licenses," "to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers," and "to the agency or a member or members of the body comprising the agency." To the extent that these provisions permitted ex parte communications with private parties, they have, of course, been superseded by the Government in the Sunshine Act amendment of §557.

It is also noteworthy that the legislative history of the Government in the Sunshine Act itself seems to reflect a general consensus that a ban on ex parte communications in §553 rulemaking proceedings would be undesirable. In the first place, none of the American Bar Association supported bills dealing with ex parte communications undertook to prohibit such communications in §553 rulemaking proceedings; they were all limited to §556 and §557 "on-the-record" proceedings.[7] This was also true of all the bills which eventually led up to the adoption of the Government in the Sunshine Act with the single exception of S. 260, which explicitly made its ex parte communications provision applicable to §553 rulemaking proceedings.[8] This provision was disapproved by almost all of the witnesses who testified on this aspect of the Bill. Even Mr. Geller, who introduced the ex parte communications issue into the Home Box case, expressed the view that the ex parte communication prohibitions should not apply to §553 rulemaking proceedings.[9] Similarly the Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York on S. 5, after noting with approval the limitation of the ex parte provisions of that bill to formal hearings because "extension of its ex parte rules to notice and comment rulemaking would result in undesirable rigidity" (p. 21), offered some tentative suggestions with respect to possible future developments in opening up notice and comment rulemaking to greater public scrutiny.[10] These included the possibility that all written communications received after the issuance of notice of proposed rulemaking should be placed in a public file which, at some time before the agency made its final determination, would be made available to the public. But the Report also added this qualification: "A requirement that agency officials prepare a summary of every oral communication they receive regarding an investigation which has been 'noticed' appears, however, to be a burden which would unduly hamper the activities of the agency and result in lack of compliance." Federal Legislative Report No. 75–1 (March 31, 1975) at p. 22.

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[7] Senate Report No. 94–354, 94th Cong., 1st Sess. (1975) at pp. 203–204.

[8] This was the original form of S. 260. See Hearings Before Subcommittee on Reorganization, Research and International Organizations of Committee on Government Operations, 93rd Cong., 2nd Sess. (1974) at p. 334.

In the light of this general background it is clear that, apart from the analogy to Sangamon, the Court's Home Box Office opinion, in its strictures against all ex parte communications after notice of proposed rulemaking, is a departure from the generally prevailing view over many years with respect to the informality and flexibility permissible in §553 rulemaking proceedings. This is made especially apparent by the flat statement in the opinion to the effect that: "Once a notice of proposed rulemaking has been issued, however, any agency official or employee who is or reasonably may be expected to be involved in the decisional process of the rulemaking proceeding should 'refus[e] to discuss matters relating to the disposition of a [rulemaking] proceeding with any interested private party, or an attorney or agent for any such party, prior to the [agency's] decision. . . .' " Slip Opinion at pp. 97–98. Nevertheless, it must also be recognized that the prevailing view with respect to informality in §553 rulemaking proceeding was developed before, or without apparent reference to, the statutory or judicial prescription of judicial review on the administrative record of §553 proceedings.[11]

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[9] Hearings on S. 260 supra, at 219. See also testimony of Mr. Ray Garret, Chairman of the SEC, at pp. 214–215; and Mr. Richard Berg, Executive Secretary of the Administrative Conference of the United States, at pp. 248–249.

[10] See testimony of Mr. Eric Bregman on behalf of the Association of the Bar of the City of New York, Hearings Before a Subcommittee of the House Committee on Government Operations on H.R. 10315 and H.R. 9868, 94th Cong., 1st Sess. (1975) at pp. 219–257.

[11] There are some opinions that reflect the original view of the unconfined nature of §553 proceedings, even though review was apparently on the record of the administrative proceedings. Examples of these are California Citizens Band Association v. United States, 375 F.2d 43 (9th Cir. 1967), and Angel v. Butz, 487 F.2d 260 (10th Cir. 1973). While the results in these cases are probably still sound, the language of the opinions would have to be revised substantially to make them consistent with the generally prevailing procedural law of §553 proceedings. Compare cases cited in Footnote 13 infra.

The crucial question is whether the development of this type of judicial review necessarily or properly implies the accompanying development of rules discouraging ex parte communications in §553 proceedings essentially similar to the law or policy prevailing with respect to formal proceedings.[12]

In support of its view the opinion in the Home Box Office case suggests that a reviewing court cannot determine whether an administrator's discretion was exercised in a rational and responsible manner unless the court can be sure that it has available to it in the administrative record all of the relevant representations made to the administrator. Superficially this position is not entirely without merit. But it also suffers from over-identification of the Court's role with that of the agency both in the development of policy and the resolution of factual issues. The strictures which the courts of appeals in general and the District of Columbia Court in particular have already imposed upon the conduct of §553 proceedings go far toward assuring an adequate basis for judicial review of both factual and policy determinations. As the Home Box Office case emphasizes, the opening statement accompanying the Notice of Proposed Rulemaking must now include a summary of the factual material that the agency considers relevant, accompanied by any internal staff memoranda or studies upon which the agency has relied in reaching those factual conclusions. The opportunity of private parties to respond is well calculated to bring to light any significant factual disagreements. How those disagreements are to be resolved then depends on the nature of the factual issues involved. This is the teaching of many leading opinions, including those of the District of Columbia Circuit itself.[13] In some of these opinions the courts concluded that there were no significant issues of concrete fact requiring further adversary proceedings for their resolution; in others the courts found just the opposite and remanded for appropriate proceedings. In either event, it is difficult to see how the presence of ex parte communications could have had any significant impact on the process of judicial review with respect to the merits of factual questions. Presumably the administrator could not have relied upon ex parte communications to support his findings of fact. Neither could the challenging parties have relied upon such communications to support their version of the facts. In that sense it would appear that judicial review on the record of §553 rulemaking proceedings should have a healthy effect in discouraging too much reliance upon ex parte communications. That is not the same thing as saying that the presence of ex parte communications will have a debilitating effect on review; indeed the opposite seems to have been true in Home Box Office, since the Court had no hesitancy in setting aside the Commission's order as "arbitrary, capricious and unauthorized by law." [14]

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[12] There are apparently few decisions dealing directly with ex parte communications in informal rulemaking proceedings. The Home Box Office opinion cites two, besides the Sangamon case. One, Courtaulds (Alabama) Inc. v. Dixon, 294 F.2d 899 (D.C. Cir. 1961), involved a rule promulgated by the FTC under the Title Fiber Products Identification Act establishing generic names for manufactured fibers. The appellant asserted that the Commission procedures were invalid because the Commission and its staff during the course of the rulemaking proceedings received ex parte pertinent material and information from governmental and private sources. The Commission in issuing the final rules considered the public record, its own files and such ex parte communications. The Court rejected the claim that this was a violation of the Sangamon principle on the grounds that the case in no way involved a license available to only one competitor, that there was no showing as to what competitors were advantaged by the Commission's rule, and that the "proceeding was clearly one of rulemaking both in form and substance, and hence was not subject to all the restrictions applicable to a quasi-judicial hearing." (P. 905).

In the second case, Ruppert v. Washington, 366 F. Supp. 686 (D.D.C. 1973), aff'd by order of the Court of Appeals, the plaintiffs challenged the legality of a Zoning Commission order resulting in the down-zoning of a substantial part of the downtown area. The district judge characterized the administrative proceedings as "quasi-legislative in character, not adjudicative in nature." However, he also said that "the Court is not required to hold a trial de novo nor may it substitute its view of the evidence before the Commission for that of the Commission." 366 F. Supp. at 688. Finally, he declined to dismiss summarily the plaintiff's claim that the Zoning Commission had "received and presumably considered oral and written information, ex parte, and that these communications are not a matter of record." 366 F. Supp. at 689. Instead the district judge permitted limited discovery into the ex parte phase of the case, after which he concluded that it was not serious enough to vitiate the proceedings. The opinion is ambiguous. Some emphasis was placed on the fact that the ex parte communications were from public agencies with legitimate interests.

[13] These significant opinions include the following: American Air Lines, Inc. v. C.A.B., 359 F.2d 624 (D.C. Cir. 1966); Automotive Parts and Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968); Chrysler Corp. v. Department of

The relation between ex parte communications and judicial review of questions of policy presents more subtle difficulties. The Court's concern seems to be that the agency may have presented one policy rationale in its

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Transportation, 472 F.2d 659 (6th Cir. 1972); Associated Industries of N.Y.S., Inc. v. Department of Labor, 487 F.2d 342 (2d Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Mobil Oil Corp. v. F.P.C., 483 F.2d 1238 (D.C. Cir. 1973); Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); Amoco Oil Co. v. EPA, 501 F.2d 722 (D.C. Cir. 1974); Bell Telephone Co. of Pennsylvania v. F.C.C., 503 F.2d 1250 (3d Cir. 1974); Industrial Union Dept. A.F.L. C.I.O. v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974); South Terminal Corp. v. E.P.A., 504 F.2d 646 (1st Cir. 1974); National Courier Ass'n v. Board of Governors of Federal Reserve System, 516 F.2d 1229 (D.C. Cir. 1975); National Asphalt Pavement Ass'n v. Train, 539 F.2d 775 (D.C. Cir. 1976).

In the National Courier opinion the Court particularly considered the question whether the record must include "intra-agency memoranda addressed to the Board from its Legal Division and its Research and Statistics Division, parts of which the Board deleted on the ground that they contained 'internal recommendations, staff analysis, and work product and legal opinions." 516 F.2d at 1241. As a general guide to the resolution of this question the Court announced this proposition: "The proper approach, therefore, would appear to be to consider any document that might have influenced the agency's decision to be 'evidence' within the statutory definition, but subject to any privilege that the agency properly claims as protecting its interest in non-disclosure." 516 F.2d at 1241. Drawing on the analogy of the scope of the privilege for intra-agency memoranda in the Freedom of Information Act, the Court concluded that the record should contain "(1) those parts of such memoranda as are purely factual in nature . . . and (2) memoranda adopted by the agency as part of its decision." 516 F.2d at 1242.

The opinion in Home Box Office may have had in mind the National Courier opinion, as well as Environmental Defense Fund v. EPA, — F.2d — (D.C. Cir. Nov. 10, 1976), cited in Footnote 121, when it said: "From a functional stand-point, we see no difference between assertions of fact and expert opinion tendered by the public, and that generated internally in an agency. . . ." Slip Opinion at 92. In making this analogy the Court seems to ignore the equally compelling analogy to the internal communications which are apparently exempt from disclosure under the FOIA and the Courier opinion. A more general principle that might be said to apply equally to both internal communications and ex parte private communications would be that all factual statements which are relevant to the issues and might have been so treated by the agency should be included in the record. In the first instance the application of this principle would have to depend upon the agency's own sense of relevance and its scrupulousness in keeping a record of all communications. An absolute rule requiring all communications, internal or external, factual or argumentative, to be on the record would theoretically solve the difficulty, but even if such a rule could be enforced with draconian severity, its contribution to fairness would have to be weighed against its inhibiting and delaying characteristics.

These developments are fully explored in articles by Dean Carl Auerbach and Professor Ralph Fuchs, which are soon to be published in the Northwestern University Law Review. Dean Auerbach, in particular, although he approves of the legal basis for most of these decisions, also expresses concern that the informal rulemaking process may have become overformalized as a result of them. He proposes, as a remedy, the separation of the formulation and adoption of the rule from the process of challenging its validity and building an administrative record for the purpose of judicial review.

[14] The decision on the merits was based partly upon First Amendment considerations but it was also based upon lack of evidence in the record to support the Commission's assumption that, unless cable television programming was limited by regulation, so much "siphoning" of programs from free television would occur that the public would be substantially injured. Because of this lack of evidence, the cable television rules were, in the Court's view, arbitrary and capricious.

statements for the record, while it actually reached its conclusion on the basis of quite a different rationale, developed only in ex parte conversations. In part, at least, this seems to be the suspicion of the Court in Home Box Office. Various extreme possibilities might be postulated. A powerful private interest might threaten a commissioner with opposition to his reappointment; or a powerful congressman might threaten a cut in appropriations. Such obvious abuses of power might occur no matter what rules are adopted with respect to ex parte communications. A more realistic concern is that the policy formulations of an agency may only dimly or inaccurately reflect what its public policy concerns really are. But this is a problem inherent in all decision-making processes; criticism and exposure of this intellectual failing is the staple of much scholarly criticism of judicial opinions. Again there is little reason to believe that ex parte communications have much bearing on the problem. Presumably administrative decision makers, like judicial decision makers, will try to put forward the best rationale they can think of for their policy choices. So far as judicial review is concerned, if the formulation given is an appropriate one under the governing statute, that should be sufficient to sustain the administrative action. It might be that administrative action was also motivated by some other policy considerations which could not be so easily articulated or which had no relation to the acknowledged purposes of the statute or the agency. Such ulterior purposes might or might not be suggested by disclosure of ex parte communications. Even so it is hard to see why the existence of such ulterior motives should be the proper concern of a reviewing court, any more than it would be if the court were reviewing the reasonableness of legislation. Compare *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185–186 (1936).

There is, on a theoretical level at least, more justification for the court's concern that ex parte communications might deprive some parties to the proceedings of their right to a fair hearing. It must be emphasized, however, that the right to a fair hearing in this context is dependent upon the mechanics of judicial review rather than upon the nature of the administrative proceedings. Unless the whole course of decisions stretching from the Bi-Metallic case to the Florida East Coast case is to be repudiated, it must be assumed that the rulemaking proceedings themselves did not engender any right to an administrative hearing in any interested parties, except insofar as such a right was accorded by statute. Nevertheless, it must also be assumed that due process does include a fair opportunity to challenge the validity of the rule in judicial proceedings on factual as well as legal grounds. Even in the Pacific States Box and Basket case, supra, when Mr. Justice Brandeis spoke of the presumption of validity that attached to administrative regulations, he was careful to qualify the statement by reference to the opportunity to establish, in appropriate judicial proceedings, the contrary of the facts apparently assumed by the administrator. In judicial review on the record of the administrative proceedings the court must similarly require a fair opportunity in the course of the administrative proceedings to establish the contrary of the facts assumed by the administrator. This is the basis upon which the courts of appeals in reviewing rules made in §553 proceedings have engrafted upon the statutory framework additional requirements designed to assure that all interested parties will have an adequate opportunity to know the basis upon which the administrator purports to act and to rebut the factual assumptions underlying his judgments. It is also the rationale for additional legislative requirements with respect to rulemaking proceedings in such statutes as the Consumer Products Safety Act,[15] Fair Trade Commission Improvement Act [16] and the Securities Exchange Act Amendments of 1975.[17] It is also noteworthy that none of these statutory elaborations of the essentials of fair hearing in rulemaking proceedings, designed in part to assure an adequate record for judicial review, saw fit to include a prohibition of ex parte communications. The hard question is whether the essentials of fair hearing in the full context of the proceedings justify the implication of such a prohibition.

In approaching this question it is important to remember that judicial review is not the major objective of the proceedings. Neither are the proceedings necessarily adversary in character, in the sense that was emphasized, for example, by Chief Justice Hughes in the Morgan cases. In the ordinary rulemaking proceedings the parties are not identified in advance. Neither are conflicting interests established in advance among those subject to the proposed regulation or between them and the government agency involved. In such a situation the very concept of ex parte communications is strikingly out of place; there are no parties to begin with and it is entirely problematic what parties will develop and what their conflicting interests will be. It is entirely possible that informal conferences will resolve any outstanding difficulties or disagreements and that there will be no occasion for a challenge to the validity of the regulations and the exercise of judicial review. Under such circumstances it would be unfortunate if the mere possibility of judicial review should warp the most natural and beneficial course of the proceedings. For most rulemaking proceedings experience seems to tell us that the most natural and beneficial course is a maximum opportunity for easy and informal contacts between the public and the regulatory agency.[18] There is a basic inconsistency between that objective and the requirement that all contacts should be either at public hearings, duly noticed in advance, with equal opportunity for all those interested to participate orally, or by written communications designed for incorporation in a public file. Apart from the physical and mechanical handicaps inherent in such arrangements, they are also subject to the psychological impediments which make it difficult to explore truly tentative positions and uncertainties in a public setting. There are, therefore, strong reasons to avoid an iron-clad prohibition against ex parte communications in rulemaking proceedings, unless there are compelling considerations of fair hearing pointing in the opposite direction.

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[15] 15 U.S.C.A. §2058 (1972).

[16] 15 U.S.C.A. §57a (1975).

[17] 15 U.S.C.A. §78s (1975).

[18] Such contracts might, and in practice frequently do, include telephone conversations between staff members and members of the public, other agencies of the federal government, members of Congress, and state and local officials intimately concerned with the subject matter of proposed regulation; meetings between staff members and individuals or groups belonging to the various constituencies mentioned; on site inspections or visits by staff members, coupled with interviews with the most knowledgeable members of the public or the industry subject to the regulation. While the results of such myriad contacts might be summarized and incorporated in public files, to treat each contact as an ex parte communication to be separately noticed in advance for general participation by the public, would tax the facilities of the agency and the patience of the individuals concerned far beyond their effective limits.

The principal concern on this score expressed by the Court's opinion in the Box Office case was that interested parties not privy to the ex parte communications might be prejudiced by the lack of adequate opportunity to respond to representations by other parties with opposing interests. This assumes, of course, just such opposing interests as were present in the Home Box Office case. The crucial question is whether the likelihood of such a risk is sufficiently great to justify a general prohibition applying to all section 553 rulemaking proceedings. The first qualification to be kept in mind is that in many rulemaking proceedings there will be no such opposing parties. In the second place, even if there are such parties, the ex parte communications may not deal with the issues that are in dispute between them. Assuming, however, that there are such issues, they might be conveniently divided into three categories — legal issues, factual issues, and policy issues. The legal issues may be rather summarily dismissed. Presumably they will be apparent on the face of the proceedings, including the notice of asserted legal basis for the proposed action. If there are such issues it will be to everyone's interest to make their best case in the public proceedings as well as in any private discussions. Failure to present any legal objections on the face of the administrative proceedings can only prejudice the presentation of such objections in the proceedings on judicial review. Furthermore, since such issues will be open for full review in the judicial review proceedings, if they do occur, it is hard to see how any of the contending parties could benefit by something less than full disclosure of their legal arguments or by secret rather than open presentation of such arguments.

With respect to factual questions the problem might be a more realistic one. It is conceivable that some of the parties might have some confidential data about their own businesses which they would be willing to disclose to the administrator, but not to the opposing parties. This is one of the most ticklish questions that can arise in any proceedings, formal or informal. Compare *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1964).[19] For most practical purposes a solution can be worked out whereby the administrator gets all the information but the opposing parties get summaries with identifying characteristics removed. Here again the potentialities of judicial review on the record of the administrative proceedings provide an incentive to all parties to make the fullest disclosure on the record to protect their own interests. If the disclosure is not sufficient for purposes of rebuttal, this itself will be grounds for challenge on due process or fair hearing grounds in the course of judicial review. Another possibility is that data submitted by some of the parties on the record of the proceedings may be discredited by other parties in the course of private conversations. Here again, this is risky business both for the parties concerned and the administrator. If the administrator ignores relevant information in the record without adequate explanation, this itself may provide grounds for setting aside his findings by the reviewing court. Of course, there is always the possibility that the record evidence might be so evenly balanced that the administrator could find either way without substantial risk of reversal. Conceivably, ex parte communications might be the decisive factor in making up his mind. This is presumably the major justification for the prohibition of ex parte communications in judicial proceedings and quasi-judicial proceedings. If exactly the same problem should arise in section 553 rulemaking proceedings there is good reason for saying it should be resolved in the same way. However, the likelihood of its arising in most rulemaking proceedings is so slight that it provides little justification for the kind of absolute prohibition suggested by the Home Box Office opinion. On the other hand, administrative agencies might well be alert to the possibility of such a situation arising in rulemaking proceedings, especially where there are opposing private interests or disputed factual issues with respect to which ex parte communications might make a decisive difference. In such a situation a ban on ex parte communications might well be called for and failure to impose it might be an appropriate ground for judicial reversal. In order to minimize the likelihood of this occurring, the general procedural regulations of the agencies could provide for the invocation of such a ban in appropriate circumstances.

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[19] The Baldo Electric case is symptomatic of the difficulties involved in requiring all communications to be public. It grew out of formal rulemaking proceedings conducted under the Walsh-Healey Public Contracts Act for the purpose of

Questions of policy fall somewhere between questions of law and questions of fact insofar as the risks of ex parte communications are concerned. On the one hand, it is difficult to believe that significant policy issues would not be fully ventilated on the face of the open proceedings, just as much as significant legal issues would be. On the other hand, policy

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establishing the prevailing minimum wage for a particular industry. By explicit provision such determinations were required to be "made on the record after opportunity for hearing"; consequently sections 556 and 557 of the APA applied. A possible effect of the decision was to require the Administrator to release to all members of the industry the specific data supplied by individual members, rather than summaries without individual identification of the underlying data. The possibility of such a disclosure requirement was so shocking to the industry and the Bureau of Labor Statistics that it threatened for a time to undermine the efficacy of the statute. See Morton, Public Contracts and Private Wages: Experience Under the Walsh-Healey Act (1965) at pp. 78–79. A prohibition of all ex parte communications, literally interpreted, would presumably have had the same effect.

judgments, like factual judgments, would call for considerable deference in the course of judicial review. However, in this latter respect, there would be no difference between judicial review on the administrative record and de novo judicial review without any administrative record. It is true that the Home Box Office opinion introduces the additional concept, borrowed from proceedings like the Chenery cases, that the administrator cannot justify his determinations by policy considerations that were not advanced in the course of the administrative proceedings. Compare *Securities Exchange Commission v. Chenery* 318 U.S. 80 (1943).[20] But even if the agency cannot defend the regulation upon grounds not disclosed in the record, it does not follow that, simply because ex parte communications might have suggested such different policy considerations, the rule should be invalidated. The significant questions would be whether the agency was in fact influenced by such considerations and whether they introduced new policy issues of which other interested parties were not aware. The likelihood of this occurring seems relatively remote since it is difficult to see why such considerations, if they tended to support the regulation, would be hidden from the outside world. It seems more likely that they would be kept out of the public record because they were regarded as irrelevant or could not be satisfactorily articulated. Furthermore, careful regard for the application of the Sangamon principle — or a requirement that all written communications and the substance of all oral communications dealing with the merits of a proposed rule and not exempt from disclosure under the Freedom of Information Act must be placed in the public file — should be sufficient to protect against unfairness to other interested parties.[21]

Insofar as the foregoing considerations suggest that a general prohibition of ex parte communications is both unnecessary and undesirable, they are illustrated and confirmed by the recent opinion of a panel of the Court of Appeals for the District of Columbia Circuit in *Action for Children's Television v. F.C.C.*, No. 74–2006, decided July 1, 1977.[22] This opinion carefully considers and explicitly rejects the general position taken by a different panel of the same court in the Home Box Office case, although, as the opinion itself notes, the Children's Television case was easily distinguishable on its facts from the Home Box Office case. Children's Television came before the Court on a petition to review a decision by the FCC not to adopt certain rules proposed by the petitioner, Action for Children's Television, or ACT, to improve children's television, especially by increasing the amount of such programming and by limiting or eliminating commercial advertising in connection with such programs. After considerable preliminary deliberation and investigation of these proposals, the FCC issued a Notice of Inquiry and Notice of Proposed Rulemaking, saying in effect that it was seriously considering the adoption of these or similar proposals, but at the same time warning that it might ultimately decide against such adoption. 28 F.C.C.2d 368, 372–376 (1971). There followed elaborate §553 proceedings, which are thus described in the Court's opinion:

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[20] This is a principle which the D.C. Circuit has enunciated several times before in some of the cases previously mentioned. See, for example, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 395 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 (D.C. Cir. 1973).

[21] A particular concern of the Court and the petitioners in the Home Box Office case seems to have been that the ex parte communications there involved in effect concealed a bargaining process that went on between the FCC and representatives of the broadcasting industry and eventuated in a compromise between the public position of the industry opposing any relaxation of the limitations on cable television and the most drastic relaxation of those limitations that was feared by the industry. Although such a bargaining process may not be the most engaging model of the regulatory process, neither is it an unmitigated evil to be stamped out of existence at the behest of the judiciary. Just as compromises are frequently essential elements of the legislative process, they may sometimes be an appropriate and even necessary part of the quasi-legislative or rulemaking process. When an agency is dealing with anticipated effects of regulatory changes which have no background in experience, it may be of considerable importance to find out what the industry is willing to accept as something it "can probably live with." Such reluctant admissions may come out only in confidential discussions, as opposed to public or on-the-record concessions. It is true, as the Home Box Office opinion emphasizes, that Chairman Wiley himself decried the tendency of the broadcasting industry representatives to take "hardline" positions in the formal proceedings while reserving for private discussions more realistic admissions of what they might be willing to accept. He also suggested that the Commission might meet this problem by prohibiting entirely private discussions after notice of public hearing, and accepting at its face value the "hard line" position presented at the hearing, thus cutting off the possibility of compromise. Home Box Office, Slip Opinion at p. 94, Fn. 7, 123. However, it is also interesting to note that the petitioner in Action for Children's Television v. F.C.C., C.A.D.C., No. 74–20006, July 1, 1977, charged that Chairman Wiley was himself especially responsible for the "closed-door" bargaining which eventuated in changes in the Broadcasting Industry's Code of Self-Regulation and termination of the proposed rulemaking with respect to children's television.

> By its own description, response to the Commission's *Notice* was "overwhelming." 50 F.C.C.2d 1, 2 (1974); J.A. 2. More than 100,000 comments were filed, filling 63 docket volumes, licensees and networks submitted extensive formal pleadings and programming data and, during 1972 and 1973, the Commission hosted three days of panel discussions and three days of oral argument during which representatives of the industry and members of the general public were afforded an opportunity to express their views regarding the full spectrum of children's television practices. *See id.* at 32–34; J.A. 49–51. ACT subsequently filed comprehensive reply comments, J.A. 125–87, in support of its essential position that "unless commercial pressures were eliminated, children would never receive adequate broadcast service." Petitioner's Brief at 11. Slip Opinion pp. 6–7.

The proceedings finally culminated with the issuance by the Commission of its Children's Television Report and Policy Statement which explained its decision not to adopt specific rules governing children's television practices at that time. 50 F.C.C.2d 1 (1974).

The public §553 proceedings were not, however, all that transpired between the FCC and officials of the broadcasting industry during the period between the issuance of the formal Notice of Proposed Rulemaking and the final negative decision of the Commission. The National Association of Broadcasters devoted considerable attention to the problem and eventually amended its self-regulatory Code dealing with the nature and amount of advertising used in connection with children's programs. The petitioner ACT charged, in its petition for review, that these amendments of the Code were in effect negotiated "behind the closed doors of Chairman Wiley's office in a private meeting with NAB officials . . . [in which] the industry was clearly coerced into action under the threat of FCC regulation." This type of negotiations, ACT contended, "undermines the administrative process since it denies public participation at *every* stage of the regulatory process when issues of critical public importance are considered, frustrates effective judicial review and renders the extensive comment-gathering stage 'little more than a sop. . . .' " Slip Opinion at p. 18. Judge Tamm's opinion for the Court of Appeals directly meets and rejects this objection after observing that "a thorough airing of ACT's procedural challenge would not be inappropriate in this case, especially in light of the agency's tentative conclusion of these informal rulemaking proceedings shortly after ex parte discussions with regulatee representatives." Slip Opinion at p. 20.

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[22] This panel consisted of Circuit Judges Tamm, MacKinnon and Wilkey. The opinion was written by Judge Tamm. It will be recalled that Judge MacKinnon also sat on the Home Box Office panel and disassociated himself from the broad sweep of the majority's position on ex parte communications.

In the course of this "thorough airing" of the issue, the Court's opinion in Children's Television, after examining in detail previous judicial decisions on ex parte communications and the legislative history of both the APA and the Sunshine Act, concludes: "The novelty of this requirement [of the Home Box Office opinion] should have been apparent to all." Slip Opinion at p. 33.[23] In addition to its analytical and historical dissection of the problem, Judge Tamm's opinion also summarizes the practical objections to a general prohibition of ex parte contacts in §553 proceedings in the following passage:

> If we go as far as *Home Box Office* does in its ex parte ruling in ensuring a "whole record" for our review, why not go further to require the decisionmaker to summarize and make available for public comment every status inquiry from a Congressman or any germane material — say a newspaper editorial — that he or she reads or their evening-hour ruminations? *See generally* DAVIS, *supra* §13.12 (Supp. 1970). In the end, why not administer a lie-detector test to ascertain whether the required summary is an accurate and complete one? The problem is obviously a matter of degree, and the appropriate line must be drawn somewhere. In light of what must be pre-

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[23] In reaching this conclusion Judge Tamm also took account of such cases as Moss v. C.A.B. 430 F.2d 891 (D.C. Cir. 1970), and Writers Guild of America, West, Inc. v. F.C.C., 423 F. Supp. 1064 (D.C. Calif. 1976). In the Moss case, ex parte meetings between the airlines and the CAB were "followed by what was alleged to be nothing more than a pro forma public hearing limited to oral argument." The Court found that the CAB's order which purported simply to approve carrier proposed rates, was really a prescription of rates, without public hearing, because the "pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistible." This Judge Tamm distinguished as a violation of the hearing provisions of Federal Aviation Act. Slip Opinion at pp. 27–28, Fn. 25.

In the Writers Guild case the district court held that the FCC had violated §553 of the APA because: "Without providing public notice and without affording any opportunity for interested parties to be heard, the Commission, acting through its Chairman, negotiated with powerful industry forces to form a new policy for television, new policy which affects millions of lives." 423 F. Supp. at 1151. This decision Judge Tamm distinguished because the Commission there entirely ignored §553 of the APA whereas here "the FCC substantially complied with the requirements of §553." Slip Opinion at pp. 28–31, Fn. 27.

Finally, Judge Tamm's opinion relies upon a decision not mentioned in the Home Box Office opinion, Van Curler Broadcasting Corp. v. United States, 236 F. 2d 727 (D.C. Cir. en banc) cert. denied, 352 U.S. 935 (1962). In that case the Court held that ex parte contacts between Commission members and CBS representatives during informal rulemaking proceedings on a TV channel assignment did not invalidate the Commission's subsequent allocation. After explaining the rather uncertain reasoning of Van Curler, Judge Tamm's opinion concludes: "We do not propose to argue that Van Curler stands for the proposition that ex parte contacts always are permissible in informal rulemaking proceedings — they are of course not — but we do think it can be read as supporting the proposition that ex parte contacts do not per se vitiate agency informal rulemaking action, but only do so if it appears from the administrative record under review that they may have materially influenced the action ultimately taken." Slip Opinion at pp. 35–36.

> sumed to be Congress' intent not to prohibit or require disclosure of all ex parte contacts during or after the public comment stage, *see* note 27, *supra*, we would draw that line at the point where the rulemaking proceedings involve "competing claims to a valuable privilege." *Home Box Office, supra* at 7 (MacKinnon, J., concurring specially). It is at that point where the potential for unfair advantage outweighs the practical burdens, which we imagine would not be insubstantial, that such a judicially-conceived rule would place upon administrators. As Judge Leventhal has cautioned in *American Airlines, Inc. v. CAB*, 359 F.2d 624, 629 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966):
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> > [R]ule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy . . . [and] is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.
>
> *See also Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338–43 (D.C. Cir. 1968). Slip Opinion at pp. 36–37.

In sum, I conclude that the extent to which ex parte communications might interfere with the adequacy of judicial review or the fairness of the administrative hearing is not sufficient to justify an absolute ban upon ex parte communications in section 553 rulemaking proceedings. I am further confirmed in this view by my concern that such a ban might well prove self-defeating. It is obviously impracticable to apply such a ban to communications occurring before the formal notice of proposed rulemaking is issued.[24] Consequently, the effect of the ban might well be to encourage the agency and the more active or influential members of the industry involved to carry on their most significant discussions before the notice of proposed rulemaking is issued, thus reducing the statutory part of the proceeding to a relatively insignificant formality. If that should happen it would not be the first time that the complications of formal proceedings may have induced administrative agencies to accomplish their most important business by less formal means. It was impatience with long drawn-out formal proceedings under sections 556 and 557 that led the ICC to turn to section 553 rulemaking proceedings in the Florida East Coast case, and FPC to do the same in the National Gas Rate Order proceedings. Opinion No. 699, FPC, June 21, 1971, sustained in *Shell Oil Company v. FPC*, 520 F.2d 1061 (5th Cir. 1975).[25] Consequently, it would not be surprising if overformalization of section 553 rulemaking proceedings were to encourage the disposition of most substantial questions in informal negotiations before the formal notice of proposed rulemaking was issued. This would of course vitiate the major purpose of the Home Box Office opinion and reduce the section 553 proceedings to even more of an empty shell than the Court itself seemed to feel might have resulted from the presence of ex parte communications.

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[24] It should also be noted that "ex parte communications" are likely to take place after the rule has been issued, because in rulemaking, unlike adjudication, the problem is a continuing one. The rule is in effect always open to reconsideration and those subject to it may well continue their efforts to get it revised while it is being challenged in the courts and perhaps long afterwards. Consequently any cut-off of such communications for a particular period is likely to be an artificial one, whether one looks at the beginning of the period or at the end of it.

[25] It should be noted, however, that use of informal §553 proceedings, as distinguished from §556 and §557 formal proceedings, was not passed on directly by the Court in the Shell Oil case, because it found the proceedings adequate to satisfy the requirements of §556 and §557 as well as those of §553. It should also be noted that the FPC by its own procedural regulations bars the use of ex parte communications in general ratemaking proceeding, even though they purport to be carried on under the aegis of §553. Order instituting National Rate Proceeding, Dec. 4, 1974, Docket No. RM 75–14 (39 F.R. 43093). This is not surprising since both the nature of the conflicting private interests and the character of the factual issues in dispute are well calculated to bring such proceedings within the scope of the Sangamon principle.

I also believe that this conclusion is not inconsistent with the major purposes of the Government in the Sunshine Act and the Freedom of Information Act. Those statutes represent careful compromises between the right of the public to know what is going on in their government and the need of government officials for a measure of privacy both in their internal deliberations and in their communications with various sectors of the public. Presumably those statutes presently go about as far as the Congress thought feasible and desirable in requiring governmental operations to be carried on in a gold-fish bowl. Their general requirements apply as much to communications that occur in the course of section 553 proceedings as to any other governmental operations.[26] They also leave a measure of discretion to the various governmental agencies in experimenting with more drastic requirements with respect to the openness of all government operations. Some agencies might, for example, provide that, after notice of proposed rulemaking, all written communications and summaries of all oral communications dealing with the merits of the proposed rule, and not exempt from disclosure under the Freedom of Information Act, must be placed in the public file.[27] Other governmental agencies might wish to experiment with a requirement as drastic as that suggested by the Home Box Office opinion, prohibiting all ex parte communications in all section 553 proceedings after the notice of proposed rulemaking.[28] I am concerned, however, that the side-effects of such a rule, if it were adopted throughout the government in all section 553 proceedings, might significantly detract from the accomplishment of the major purposes of section 553 proceedings — the education of the regulatory agencies and the effective participation of the public in the regulatory process.

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[26] Notice should also be taken of those provisions of the Federal Advisory Committee Act of 1972, 5 U.S.C. App. I, §1–15 (1977) which may also cut across §553 proceedings. Compare, Center for Auto Safety v. Tieman, 414 F. Supp. 215 (D.C. D.C. 1976); Consumers Union of U.S., Inc. v. Dept. of Health, Ed. and Welfare, 409 F. Supp. 473 (D.C. D.C. 1976); Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048 (D.C. D.C. 1974); Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975) (case dismissed Jan. 10, 1977 D.C. Cir. Ct. App. No. 75–1969).

[27] This seems to be the effect of the rules adopted by the Consumer Products Safety Commission. See testimony of Chairman Simpson, Hearings on H.R. 10315 and H.R. 9868, supra note 10 at pp. 48–81; 16 C.F.R. Part 1012 (1977). Even if it be assumed that such an internal agency rule would be desirable, it does not follow, especially in §553 rulemaking proceedings, that compliance with it should be regarded as a requirement of due process or fair hearing. If it were so regarded, it would be an invitation to bickering and litigation regarding the accuracy and the completeness of the public summaries, so adding to the time and the expense of the entire proceeding.

[28] This is the position which has recently been adopted by the CAB in amending its procedural regulations with respect to ex parte communications so as to ban such communications in §553 proceedings from the time of the notice of proposed rulemaking until the termination of the proceeding. 42 F.R. Part 300.2(b)(ii), April 11, 1977.

As another example of a recent adoption of a general ban on ex parte communications in administrative proceedings, the Home Box Office opinion points to Executive Order 11920, June 10, 1976, 12 Weekly Comp. of Presidential Documents 1040 (1976), "which prohibits ex parte contacts with members of the White House staff by those seeking to influence allocations of international air routes during the time route certifications are before the President for his approval." Slip Opinion at p. 96. Reliance on this Executive Order seems to ignore the fact that Presidential review of international air route certifications is generally the culmination of formal, on-the-record, adversary proceedings in which individual airlines compete for such certifications before the CAB. Presidential review is provided primarily for the purpose of safeguarding interests of national defense and foreign policy. With respect to such considerations the Executive Order permits exceptions to the ban on ex parte communications to "be made when the head of an appropriate department or agency outside of the Executive Office of the President personally finds that direct or oral communications between a private party and a person within the Executive Office of the President is needed for reasons of defense or foreign policy." Sec. 4, Executive Order 11920, supra at p. 1041. The apparent purpose of the Executive Order was to prevent representatives of the airlines involved from privately rearguing their CAB cases in the White House. It is also interesting that the Executive Order concludes with this paragraph:

> Sec. 6. Although it is recognized that the provisions set forth in this Order will frequently apply to review of decisions made in adversary proceedings involving private parties, this Order is intended solely for the internal guidance of the departments and agencies in order to facilitate the Presidential review process. This Order does not confer rights on private parties." Id. at 1041.

COMMITTEE MEMORANDUM IN SUPPORT OF CONFERENCE STATEMENT ON STRENGTHENING REGULATORY AGENCY MANAGEMENT THROUGH SEMINARS FOR AGENCY OFFICIALS

STRENGTHENING REGULATORY AGENCY MANAGEMENT THROUGH SEMINARS FOR AGENCY OFFICIALS

(April 11, 1975)

Background

The analysis of the role of regulatory agency chairmen and the regulatory process appearing in the report was stimulated in large part by the impression that the management capacities of chairmen were constrained in important ways by the collegial arrangements and that their formal authority was inadequate as a basis for providing central management direction. On the contrary, the study found that by and large the objectives of previous reform efforts aimed at strengthening the chairmanship have been realized. In fact, the position of chairman in the agencies generally seems substantially more influential and significant than the formal charters suggest. In areas such as personnel, budgeting, organizational structure, and work processes, chairmen appear to be preeminent in relation to their colleagues. Other members are engaged in these matters only to a limited extent. Viewing agency management broadly, chairmen also exercise considerable weight in relation to their colleagues in the direction of the work at the staff level and determining the general thrust of agency activity. Thus, whatever management problems the agencies may experience cannot be said to flow in any fundamental sense from limitations on the authority available to chairmen.

This is not to suggest an absence of management dilemmas or soft spots in the agencies. Rather it is to suggest that the dilemmas are not of the type that can be easily attacked in the traditional way, which characteristically involves suggesting the universal adoption of organizational innovations such as the strong chairmanship, the position of executive director, and the delegation of authority. Nor is it to be implied that the seminars proposed here are a panacea which alone will enable the agencies to make dramatic strides forward. It does seem, however, that there are characteristics of agency management arrangements revealed by the analysis which indicate that seminars might make a positive contribution to the agencies as they search for alternative ways of doing things which are suited to their particular needs.

Before indicating the nature of some likely contributions, certain relevant aspects of the management arrangements should be noted.

(1) Although the preeminence of chairmen in the management realm is generally established, there remains some ambiguity in their role in relation to the role of members. There are gray areas in which it is not clear where the prerogatives of the chair end and those of members

begin. This condition not infrequently results in some underlying tension in chairman-member relationships. But differences are seldom openly articulated and worked through. When differences arise, they are likely to appear in the context of a particular issue, and not in a way that provokes attention to general questions about working relationships. Uncertainty and tension about roles may well have constraining effects, particularly in regard to major management-related issues which fall into gray areas.

(2) The working relationships in a collegial setting involving chairmen, members, and top staff are unique in a number of respects. If they are not inherently more complex than in other types of organizations, they are foreign to the dominant experience of many who find themselves involved in them. Previously learned ways of doing things must be undone and new knowledge forged from experience. This can be accomplished, to be sure, but at a certain cost in time, energy, and peace-of-mind.

(3) Members of the agencies, who are, in the broad sense, ultimately charged with the responsibility for management often appear to lack interest in management matters, such as setting regulatory priorities and resources allocations, and ill-prepared to deal constructively with them.

(4) Chairmen, though thrust into a more active managerial posture because of their role, at times evidence something less than enthusiasm for responsibilities in management-related matters and have had limited preparation for this aspect of their responsibilities.

(5) As a result, there is little focused attention given at the top of the agencies to the larger management questions and particularly to the nature and viability of the processes through which major management determinations are made. Periodically to be sure, attention is engaged as a result of a particular personality mix or the stimulus of an outside agent, such as Congress or OMB. But beyond such routines as approving the annual budget submittal, questions pertaining to how well the agency is doing its work and how performance might be improved are rarely dealt with in basic ways. This condition often is frustrating, particularly to staff who have management responsibilities at that level and who perceive problems and promising lines of attack but cannot move in the face of inertia at higher levels. Supportive chairmen may provide some openings, but even the most active and able will feel anchored by the inertia of colleagues. Indeed, if chairmen are impeded in carrying out their management responsibilities by the collegial arrangement, it is more because of the passivity of other members than because of their participation.

(6) In addition to the anchor effect which comes with the indifference of members to management problems — an effect felt, it should be emphasized, not in the conduct of routine management activities but in dealing with fundamental questions of agency performance — resources

which the members represent and which could make major contributions to improving agency management are tapped in only a limited fashion despite their considerable potential.

(7) Finally, although the differences among agencies must be recognized fully in treating problems in regulatory management, there are certain commonalities. And if experiences are not directly transferable, there are positive effects that result from their exchange. Yet there is very little systematic communication among the agencies on such matters, especially at the level of chairmen and commissioners. It is quite possible that closer relationships would enable the agencies to help one another through sharing perceptions of problems, strategies for dealing with them, and information about what efforts have and have not worked in particular settings.

In summary, some of the conditions which seem to bear on agency management include uncertainties regarding roles and role relationships, especially for those new to organizations, such as these: a low level of interest in, sensitivity to, and appreciation of the value of collectively focusing on major management questions periodically; and limited exposure to information regarding the substance of regulatory management problems and possible remedial steps.

The Utility of Seminars

The seminar is a useful device for dealing with matters such as these. Well planned and adeptly conducted seminars are uniquely suited to the development of perspectives and understandings related to role questions, stimulating interest in particular problem areas, suggesting approaches to problem-solving, and providing useful information pertaining to organizational performance. This has been demonstrated through a number of efforts aimed at groups of officials not unlike the regulatory officials to be involved in the proposed activities. New members of Congress participate in such enterprises. And the seminars regularly conducted for members of the Federal judiciary by the Federal Judicial Center are especially relevant here.

Further, an approach such as this seems especially appropriate given the nature of the management task in the agencies. It bears repeating that there are no easy answers to problems of regulatory performance that can be applied as a universal quick fix. In the final analysis, responses to problems must be generated by the agencies themselves in the context of their particular circumstances and objectives. Seminars as proposed here have considerable potential for assisting the agencies in this task through providing opportunities to key officials to explore questions regarding agency performance that cannot easily be grappled with in the agency setting and by introducing them to material pertaining to agency management that ordinarily is not easily available to them in systematic form.

The Appropriateness of Administrative Conference Sponsorship

It is appropriate for the Administrative Conference to sponsor seminars. First of all, activity of this type seems clearly within the statutory authority of the Conference. The Act includes information exchange as one of the major purposes of the organization. Further, the Conference is empowered to "arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure . . ." [5 U.S.C. §574 (2)]. And, of course, administrative procedure is defined broadly "to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency actions, and the relationship of operating methods to later judicial review." [5 U.S.C. §572 (3)]. Clearly, the matters that would be dealt with in seminars would have a direct relationship to the concerns emphasized in the legislation. Second, by reason of mission, standing, and expertise, the Conference is in a better position than any other organization to carry out successfully an effort of this sort. Third, the seminars will provide another means for introducing to agency decision-makers the results of Conference efforts that are relevant to the management of regulatory programs.

Guidelines for Planning and Conducting Seminars

It would be unwise to attempt to specify at this time what the ideal seminar would be like in all of its particulars. Given the level of experience and sophistication of the clientele group, the achievement of positive results dictates flexibility in approach. Some general recommended guidelines can suggest the form the seminars are likely to take, however.

(1) Scheduling seminars should be at the discretion of the Chairman of the Conference.

(2) Special effort should be made to include new chairmen and members in each seminar to assist them in their orientation to their positions. Their more experienced colleagues and key staff persons should also be invited to participate.

(3) Representatives of the participating groups should play a major role in seminar planning together with the Chairman and staff of the Conference and such outside assistance as may be necessary.

(4) The assistance of the U.S. Civil Service Commission should be employed in planning and conducting the seminars.

(5) The seminar format should emphasize informal, problem-oriented group discussions with necessary "expert" informational inputs rather than formal presentations.

(6) To the maximum extent possible, in the interest of relevancy reliance should be placed on the participants themselves and on others

experienced in the regulatory process, including former members and chairmen, for informational inputs.

(7) Each seminar should be evaluated by the participants as an aid to improving subsequent efforts.

Illustrative Topics

A list of topics which are relevant to agency management and appropriate subjects for the type of seminar proposed appears below. Again, the intent is to illustrate, not to define or exhaust possibilities.

(1) What do members expect from chairmen?

(2) What do chairmen expect from members?

(3) The responsibilities of members in budget and personnel matters.

(4) Congressional and OMB perspectives on effective budget strategies.

(5) Problems in the role of commissioners in agency management from the perspective of chairmen.

(6) Approaches to inter-agency relations at the commission level.

(7) White House-agency relationship.

(8) Justice-agency relationship.

(9) Approaches to Congressional relations at the commission level.

(10) When do chairmen go too far, and how can they be tactfully restrained?

(11) Uses of bureau-level staff by commissioners: What are the limits?

(12) The problem of the executive director: Who is the boss?

(13) Regulatory priorities: Can agencies control them and, if so, how?

(14) Techniques for spotting and diagnosing basic management problems.

(15) Means for the articulation of basic agency policy.

(16) Alternative approaches to managing major policy studies.

(17) Means for member participation in policy-making processes.

(18) Advantages and disadvantages of the managing director concept in regulatory agencies.

(19) The allocation of decisional responsibilities among Commissioners and staff: Delegation possibilities revisited.

(20) Agency procedure as a management problem.

(21) Implications of the APA for agency management.

(22) The uses of computers in the regulatory process.

(23) Coping with increasing workloads in periods of budgetary constraint.

REPORT IN SUPPORT OF CONFERENCE STATEMENT ON PROCEDURES TO DEAL WITH EMERGENCY SHORTAGES OF NATURAL GAS

PROCEDURAL IMPLICATIONS OF ADMINISTERING EMERGENCY SHORTAGES OF NATURAL GAS

*Max D. Paglin**

I. HISTORY OF THE PROJECT

The Administrative Conference contracted with Professor Mason Willrich of the University of Virginia Law School in late 1974 to make a comprehensive review of how the Federal Power Commission administered shortages of natural gas and how the Federal Energy Administration administered shortages of petroleum products. In both instances, "shortage" was understood to mean the existence of a greater demand for the respective products at prevailing prices than there is supply.

Professor Willrich's research demonstrated procedural shortcomings in the administration of petroleum products, and he made some recommendations for their correction. Before the Committee on Ratemaking and Economic Regulation could consider the Willrich recommendations, Congress passed the Energy Policy and Conservation Act in December, 1975 which covered most of the recommendations. Thus the project was rendered moot as to the administration of petroleum shortages.

However, Professor Willrich's research also convincingly demonstrated that the procedures and authority of the Federal Power Commission are insufficient to deal with a substantial shortage of natural gas. Professor Willrich subsequently published his findings in book form,[1] and they have received high praise for revealing the inadequacies of the present system. The Committee drafted a report which was based on Professor Willrich's work and which discussed the precarious supply of natural gas. The report concluded that whether there would be a substantial shortage depended on three factors: the severity of the winter, the state of the economy, and the continued supply of imported petroleum. It also noted the great effect that shortages of natural gas can have on the economy and our national well-being. In addition, the report discussed the failures of existing governmental authority, both federal and state, to provide structures for dealing with substantial shortages. It pointed out that the procedures of the Federal Power Commission are largely designed for certification and ratemaking and that they are generally ill-suited for emergency situations. Finally, the report pointed out that the states have widely varying resources and interests, so that without more there is no way they could distribute the burden of a natural gas shortage equitably among themselves and throughout the nation.

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[1] M. Willrich, *Administration of Energy Shortages-Natural Gas and Petroleum*, Ballinger Publishing Company, Cambridge, Mass., 1976. The reader is referred to this volume for an extensive treatment of the terms and concepts discussed in this report.

Based on the Willrich book and its own report, the Committee also drafted some proposed recommendations for the Conference as a whole to consider. They provided that Congress should grant the Federal Power Commission emergency authority to allocate natural gas at all levels in the transportation and distribution system after production through retail distribution, in both interstate and intrastate markets. It was further proposed that the Commission should have authority to order physical interconnections among pipelines and to order transfers of gas between pipelines, including transfers from intrastate to interstate pipelines. This allocation authority would be of standby nature, to be used only when the President declared an emergency. In that case, the Commission would be directed to achieve an equitable economic and geographic distribution of the costs and burdens of the shortage. It would be directed to work in close coordination with the Federal Energy Administration and to act consistently with other elements of national energy policy. The draft recommendations also provided that the Commission should develop criteria, standards, procedures, and policies for administering its allocation authority through rulemaking proceedings which adhered to § 553 of the Administrative Procedure Act and appropriate recommendations of the Conference. Finally, the proposal recommended that the Commission should be authorized to require each state to develop a plan, in accordance with such statutory and Commission standards as might be developed under the proposal, for the administration of the distribution of gas within the respective states. The recommendations then set out some procedures which would govern the relationships between the states and the Commission.

During conferences which were held in April, 1976 among the Chairman of the Committee and members of the Office of the Chairman of the Conference, which were held shortly before the proposals were to be submitted to the Council of the Conference, two decisions were made as to the recommendations as then drafted. First, it was decided to modify and clarify the documents to recognize that it is up to Congress to determine (or to provide the ground rules for determining) whether the likelihood of a natural gas shortage is sufficiently high to require the establishment of Federal authority to allocate natural gas supplies on a nationwide basis, as well as to provide the allocative authority. Thus the Committee, through its Chairman, wanted to make clear that the substantive policy choices were for Congress.

The second decision was that further work would be required before the recommendations were presented to the plenary session of the Conference. The basis for the decision was that an important aspect of the recommendations involved the procedural relationship between the States and the Federal Government, but that more attention should be given to this phase of the proposals. Thus, it was decided to commission additional work in this area. Max D. Paglin, a former Vice-Chairman of the temporary Conference, and a long-time Chairman of the Committee on Agency Organization and Personnel, undertook this work as a consultant over the summer of 1976. Mr. Paglin's charge was to examine other regulatory programs involving relationships between a federal agency and state governments to see how such programs work, how well they are regarded by affected interests, and what could be learned from these experiences for purposes of testing the Committee's proposal. Mr. Paglin was also requested to consult with people who would be interested in an allocation system such as that contemplated in the draft recommendations.

This second Conference research project was designed to examine the procedural relationships involved in a statutory scheme for the establishment of federal standards, criteria, and priorities, and for the implementation thereof at state levels. It was proposed that the Paglin project should consider procedures for the development of federal guidelines for the allocation of natural gas supplies during periods of emergency shortages, and consider procedures for the delegation of authority to the several States to implement the allocation plans in accordance with the principles, criteria, and priorities established by the Federal Government.

II. THE CURRENT RESEARCH PROJECT

A. SCOPE AND DIRECTION

The scope of the research effort included a review of recent case law involving Constitutional and other legal problem areas in joint Federal/State jurisdiction; a survey of prior experience in selected areas of federal standard-setting with implementation at the state level; an examination of sample provisions of some ten existing statutes and regulatory programs setting up cooperative Federal/State jurisdiction, including an analysis and evaluation of different methods in existing regulations and programs for assuring proper implementation of federal standards; and an examination, for useful analogies, of the programs instituted by the Environmental Protection Agency (EPA) under the Clean Air Act, by the Federal Energy Administration (FEA) in its energy conservation responsibilities, and by the Occupational Safety and Health Administration (OSHA) in its Federal/State cooperative procedures.

As a supplement to this report, there is attached hereto, as *Appendix A*, a study of the results of the investigation of selected federal regulatory programs involving varying degrees of participation by state governmental entities in the implementation of federally promulgated standards. The study concentrated on eight such regulatory programs: five "safety" programs, cable television system licensing, environmental protection, and petroleum allocation. The goals and scope of each program were examined, and those parts of the programs involving state participation were explored in some depth. In addition, the supplement contains a review of several existing procedures by which federal and state regulators may coordinate their activities, and presents observations on some of the potential problems of joint Federal/State regulation.

The research effort also concentrated on reviewing past and current actions of the Federal Power Commission (FPC) in the development and implementation of its policies on curtailment of natural gas deliveries subject to FPC jurisdiction. In particular, current FPC hearings being conducted on the magnitude and potential impact of projected curtailments by nineteen major interstate pipelines were followed closely and discussed with FPC officials.[2] Past Congressional hearings on the natural gas shortage situation were studied, as were previous FPC and state commission staff reports and studies. Position papers, studies, and reports commissioned by and prepared for industry organizations, federal and state intergovernmental groups, and law firms representing participants before the FPC, along with articles in law reviews, energy journals, and periodicals, were also examined. A bibliography of the various reference materials and documents which were collected and reviewed during the research phase of this project is appended to this report as *Appendix B*.

Extensive personal interviews were conducted by the project team with numerous persons experienced in the natural gas industry and in Federal/State relationships. In addition, telephone conferences were held with others knowledgeable in these areas. Those interviewed included present and former officials of federal agencies involved in energy regulation, present and former state utility commission officials, representatives of national, state, and regional industry organizations, attorneys for participants in FPC and state commission proceedings, and officials of Federal agencies and state organizations concerned with Federal/State interrelationships. The INTERVIEW REPORT, attached hereto as *Appendix C*, contains a summation of the various views expressed by those interviewed on the matters which were the prime emphasis of our inquiry. A list of all those interviewed, in person and by telephone, and organized according to agency or organization affiliation, is attached to this report as *Appendix D*.

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[2] These proceedings were conducted under the caption: Order Instituting Proceedings, Establishing Procedures, and Providing for Hearings and Conferences to Evaluate the Impact of Natural Gas Shortages of Interstate Pipeline Companies, FPC Docket Nos. RP76–116 through RP76–134, July 20, 1976. The FPC orders and hearing transcripts were obtained by the research team. See *Appendix B*.

B. ORGANIZATION OF THE REPORT

This report is drafted as a concise summary of the findings of the research effort. In order to highlight the conclusions which the project team has drawn from the interviews and documentary materials, no extensive citation is made in the body of this report to the contents of the attached Supplements. For further elaboration, examples and documentation, the reader is referred to such Supplements.

III. ANALYSIS

A. UNRESOLVED SUBSTANTIVE POLICY ISSUES

As indicated above, this project was to be restricted to a consideration of the procedural aspects of a natural gas allocation scheme. However, as work on the project proceeded, it became clear that the problems involved in devising procedures for a national program of allocation of natural gas required addressing a complicated set of circumstances in which there existed an intermeshed complex of substantive energy policy determinations and consequent procedural implementation. For example, the persons interviewed frequently referred to various alternative policies for ameliorating the gas shortage, such as price deregulation, pro rata reductions, and end-use allocation. Each of these alternatives would require considerably different procedures for implementation, ranging from reliance on a free market mechanism with relatively little regulatory procedure, through a system of federal certification of prorationed reductions in deliveries of gas, to a federal promulgation of standards of allocation coupled with state implementation thereof under state plans submitted for federal review.

Even if Congress were to opt for some type of natural gas allocation scheme, questions of the utmost magnitude would remain: there would have to be a recognition that any end-use allocation policy not only would need to be directed to the current and forthcoming gas shortages, but also would have to be related to the nation's overall energy policy respecting supplies and uses of other fuel resources. In the implementation of such a national allocation policy, there must also be Congressional guidance on the jurisdictional problems involved, in terms of the particular governmental entities which will bear the responsibility for such implementation; i.e., whether the Executive, an independent federal regulatory agency, some state agency, or some combination thereof would be the most effective instrument to be used in carrying out Congressional policy. Congress must also set forth the statutory criteria which would govern implementation by the governmental entity so designated.

B. DATA REQUIREMENTS FOR END-USE ALLOCATION

An effective end-use allocation system is intended to control the use of gas at each "burner tip" in the entire nation. Thus, before such a program can be administered, some central regulatory authority must have available to it, among other data, information as to the amounts of gas used for each and every purpose.

A most critical problem encountered during the research, which demands urgent and definitive action, is the need in one central repository for complete, comparable, and valid data on the entire multi-faceted natural gas industry and natural gas usages in the United States. Little effective action can be taken in this area by Congress or others without such information. Such data, which many of the sources interviewed acknowledged was essential to a meaningful regulatory program but which was not readily available, would include information on available and projected supplies, reserves, and storages of natural, artificial, and synthetic gas from all sources; operational data on interstate and intrastate pipeline facilities including information on existing interconnections necessary for the transportation, distribution, and sale of gas; data regarding the end-uses of gas at the state and local levels in accordance with comparable and uniform classifications of use; information regarding the current regulations and practices of state and local agencies in the allocation and/or curtailment of natural gas in their respective jurisdictions; information as to the availability, costs, and consequences of the use of alternative fuels where required; and information as to the impact on the economy and on human needs of the curtailment of natural gas use.

A recent report of the Comptroller General of the United States, entitled "Need for the Federal Power Commission to Evaluate the Effectiveness of the Natural Gas Curtailment Policy (B–181503)," dated September 19, 1975, emphasized the need for the data outlined above and the present lack of statutory authority of the FPC to obtain such information to carry out its policies. It was also pointed out by FPC and the General Accounting Office (GAO) that the Commission had long sought additional information-gathering authority from Congress, particularly as regards the intrastate use of gas, but without success.[3]

As an example of the need for complete and valid data in order to formulate fair and effective end-use allocation policy, an official of FPC pointed out that FPC needs intrastate distributor data on "temperature sensitive" loads — those loads which vary in relation to local climatic temperature — in order to construct a workable plan for control of the natural gas distribution network. Although the distributors must use this data themselves in order to plan their operations, the distributors, which are exempt from federal jurisdiction, have been quite uncooperative in supplying this data to FPC. Further, although such data forms the basis for customer rate determinations, the state regulators responsible for local rate-setting do not obtain the data either.

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[3] As indicated in an Appendix to the GAO report, consisting of FPC's comments on the GAO draft report, the Commission has, since the 84th Congress, continually urged the amendment of Section 14 of the Natural Gas Act to augment its investigatory and information-gathering authority.

In an effort to afford the FPC with some workable information, the FPC staff has devised a "static" model of the entire interstate distribution system from producers to customers for the year 1974. A model for 1975 is now being constructed. Each model indicates what happened during the year as regards gas which flowed through interstate pipelines. The models do not, however, incorporate gas not subject to federal jurisdiction (about 40 percent of the total gas distributed) and therefore do not reflect the overall nationwide distribution pattern. A copy of the 1974 static model was obtained for use in this project.

It was emphasized that, in terms of meaningful data, the FPC needs a "dynamic" model of the distribution system. Such a model would indicate the capabilities of each part of the system, and could be used to predict the impact on one part of the system caused by a reallocation of gas in another part of the system. In order to construct such a model, the dynamic characteristics of the system, including temperature sensitivity and end-uses, would have to be known. The FPC, not having this necessary information, is conducting studies aimed at generating empirical data (rather than distributor-supplied data) to use in its dynamic model. The model thus constructed can only be expected to be a rough approximation of the actual performance capability of the interstate distribution network. Again, the dynamic model will not include intrastate distribution, and thus it will not simulate overall nationwide distribution performance capability.

In the current FPC curtailment impact hearings referred to above, efforts are being made for FPC to make use of FEA's wider information-gathering authority, bringing together data on customer alternate fuel availabilities and end-use information, in order to predict the impact of curtailments by interstate pipelines. In addition, the FPC sought to obtain the participation in the hearings of other federal and state entities capable of supplying needed data.[4] However, it is not yet certain that the data thus obtained will be in a form sufficient for FPC's regulatory needs. It was pointed out by FPC staff officials that there has been very little participation in the hearings by the States, intrastate pipelines, and local distributors. It was believed that this lack of participation is due both to a lack of interest in the proceedings and to a "wariness" of federal governmental control of the natural gas industry. This same reluctance to submit to governmental control was also believed to be felt by state regulators. The FPC's order in the proceeding required the FPC staff, at the conclusion of the hearings, to submit a report which was to be due on October 15, 1976.[5] However, because of the apparent lack of cooperation by intrastate sources, it was not expected that the report will add much beyond what is already known by the FPC.

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[4] The FPC Order of July 20, 1976, instituting the proceedings in Docket Nos. RP76–116, et al, stated:

> "The FEA is requested by the Commission to participate and to provide for the record in these proceedings state and regional information relative to alternate fuel availability for the forthcoming winter-heating season. State energy agencies and state public service commissions are also requested to participate and to provide information relating to (1) the end-use profile of natural gas for ultimate consumption which lies within the regulatory authority vested in them, (2) the lack of alternate fuel capabilities of end-users in areas subject to their jurisdiction, and (3) local conservation measures that are either directed or coordinated by them to off-set the impact of the natural gas shortage. All other interested federal and state agencies are also invited to participate in these proceedings."

In any event, it is clear that the implementation of an effective allocation scheme would require that the basic informational deficiencies described above be rectified.

C. STATE IMPLEMENTATION

1. Other Federal Regulatory Programs

As pointed out at the outset of this report, a major component of this inquiry was the examination of other regulatory programs involving Federal/State relationships. The objective of the study was to draw possible parallels between certain existing Federal/State programs and a national gas allocation scheme, with a view to recommending appropriate procedures for use in an allocation program.

The Supplement on STATE PARTICIPATION (*Appendix A*), describing in more detail the existing Federal/State regulatory programs being pursued by, among others, EPA, FEA, OSHA, and FCC, presents some interesting and potentially useful examples of effective Federal/State cooperation. In particular, the emphasis by EPA on the need for "outreach" — i.e., early involvement and effective participation by state and regional representative groups in the formulation of proposed EPA regulations and policies at the preliminary and formative stages of the process, is reviewed in some depth.[6] It would appear that such "outreach" procedures and EPA's experiences in their operation could serve as valuable precedents for use in any nationwide allocation scheme which looked to the states for implementation.

Likewise, the FCC regulatory scheme, establishing guidelines for the regulation of cable television through a dual local-franchise/federal-certification process and delegation of authority, has produced a fairly effective system of federal control of activities at the local or state level. The Commission has established certain general criteria which must be observed in the local franchising process before the FCC will issue its certification for operation of a cable system. However, the procedural rules for the franchising authority are determined locally.

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[5] The FPC has agreed to furnish the project team with a copy of the Staff Report when available.

[6] A number of EPA internal memoranda and directives spelling out the particulars for encouraging state and local participation were made available for the project team's study and are listed in the attached BIBLIOGRAPHY (*Appendix B*).

Federal/State allocation of regulatory authority is controlled by the FCC by use of a mechanism called "subject matter preemption." By taking no action on a particular matter, the FCC "allows" unimpeded state regulation of the matter. By announcing preemption of a particular matter and making rules on the matter, the FCC asserts federal regulatory control of the matter. By announcing preemption but not making rules, the FCC allows the matter to go unregulated at all governmental levels. By conditioning operator certification upon the conduct of certain matters by the franchising authority and certain terms in the franchise agreement, the FCC effectively controls the related activities of state regulators.

With regard to another aspect of state participation in federal regulatory programs, the practice of FEA and OSHA also suggests some potentially helpful analogies. These agencies have, in certain instances, provided the states with financial and personnel resources to aid in carrying out the Federal regulations, particularly where the states would otherwise be unable to cooperate effectively.[7] In light of the situation described below of some inadequacies in state regulation of natural gas, existing federal assistance practices in this regard may be of interest in considering a Federal/State gas allocation program.

As is indicated in the STATE PARTICIPATION supplement, the research effort included a study of several other statutory schemes involving Federal/State cooperative action in the implementation of "safety" programs. However, upon closer examination and consideration of the unique factors present in the existing situation, described herein, concerning natural gas usage and its regulation, it was concluded that these Federal/State "safety" programs did not afford sufficient parallels to form a useful basis for the recommendation of procedures for a natural gas end-use allocation program.

2. Natural Gas End-use Allocation Program

A serious problem encountered in the research effort involved the questions raised as to the practicality of one of the key elements involved in a cooperative Federal/State allocation scheme, i.e., the role to be played by the States in implementing the Federal criteria promulgated for allocation and end-use curtailment of natural gas supplies. The current FPC end-use curtailment policy applies only to deliveries made by interstate pipelines to their direct customers and to intrastate distributors. Under present practice, interstate pipelines have no control over the actual end-use of gas after it is delivered to intrastate distributors. From data available from state utility commission organizations, it appears that less than half of the States have adopted curtailment policies, and a number of state curtailment policies do not conform to current FPC policy respecting end-use curtailment.[8] In many other instances, state authorities do not exercise any control over deliveries by intrastate distributors. Accordingly, as a result of this bifurcated regulatory system, the current FPC curtailment policy is not necessarily reflected in the actual end-use of natural gas.

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[7] Further discussion of these practices is contained in the STATE PARTICIPATION Supplement (*Appendix A*) at A–52.

It became quite clear, from interviews with state officials and industry representatives, that many problems exist and would exist in attempting to devise a Federal/State relationship in the regulation of a gas distribution system. To begin with, many of the state governments lack the resources and the expertise to administer an end-use allocation program. There does not exist a comprehensive survey of the available personnel and financial resources of the various States to undertake a program of this kind, other than a directory of state utilities commission officials compiled by the National Association of Regulatory Utility Commissioners, which would permit a determination as to the sufficiency of state resources in this regard. Certainly it is the view of many officials in federal agencies that past experience frequently indicates a woeful lack of state-level ability to administer federal programs, even in instances where federal financial assistance for state programs is afforded. Further, some States do not presently have accurate information as to actual end-uses of natural gas within their jurisdictions or of the scope and extent of intrastate pipeline interconnection facilities and similar essential data, and therefore may not be in a position to assume effective control over the distribution of natural gas in emergency situations.

Another significant problem discussed by those interviewed was the differing jurisdictional levels responsible for the promulgation and effectuation of state energy policies. In some States, public service commissions had full jurisdiction over energy matters; in other States, the energy policies were under the control of the Governor's office or the State Legislature. The existence of these differing jurisdictional entities was said not only to forecast sensitive "political" problems in seeking to implement a Federal/State gas allocation system, but also possibly to create serious legal impediments. In a number of States, it appears that the exercise by either the utilities commission or the Governor's office of such additional authority would require passage of legislation and appropriations by the State Legislature. In certain EPA cases, now pending in the Supreme Court and involving interpretations of the Clean Air Act, the authority of the Federal Government to compel the States to pass legislation to carry out the provisions of federal statutes is being seriously challenged.[9]

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[8] *See* National Association of Regulatory Utility Commissioners (NARUC), *Survey of Actions by State Regulatory Agencies and Intrastate Natural Gas Distributors to Meet Natural Gas Shortages*, November 15, 1974.

On the other hand, it has been pointed out in our interviews that a number of the "strong regulation" States have, in past years, taken their own measures to protect the economy of their States and the needs of their citizens against the adverse effects of natural gas shortages. Such measures have included encouraging conversion to alternate fuels, albeit at considerable cost, promoting vigorous programs of consumer and industry conservation, fostering expansion of underground storage capabilities of intrastate pipelines and distribution companies, and encouraging increases in privately owned supplies of natural and synthetic gas and transportation thereof through interstate pipelines.[10] In these circumstances, it was asserted that any federal scheme of allocation which failed to recognize and "reward" such self-help programs would not only be vigorously resisted, but would be "doomed" for lack of cooperation from some of the principal state agencies.

A further concern discussed by some of the interviewees, and referred to in the INTERVIEW REPORT supplement, was the possible consequences of the dispute regarding differing methods of computing the "base" for the profile of each State's past use of natural gas in order to determine its future share in a federal allocation program. It was asserted that, if local economic requirements were not adequately and fairly accommodated, the incentive of States to take steps, such as those described above, to alleviate the impact of future shortages might be destroyed.

In the same vein, doubts were expressed by both federal and state officials that practical procedures could be worked out for a federal system contemplating multi-state participation in an allocation scheme in light of the above described lack of comparable data and questionable availability of state-level administrative expertise and resources, to say nothing of the extreme diversities among the continental 48 States in terms of economic and human needs for fuel, existing resources in fuel facilities, and differing stances of producing and consuming states. The political sensitivities inherent in such a program were emphasized by many sources.

D. INTERCONNECTIONS AND TRANSFERS

A further consideration, which would appear critical to any system of allocation designed to meet shortages in different areas of the country, would be the authorization for a federal agency, such as the FPC, to order interconnections of interstate and intrastate pipelines and to direct transfers of gas to meet high priority needs through both interstate and intrastate pipelines. The lack of complete and accurate data in one place regarding interconnection facilities has already been pointed out above. It appears that some data exist in varying forms in the files of the FPC, the FEA, the Department of Transportation, interstate pipeline companies, some state commissions, and intrastate distribution companies. However, our interviews disclosed that the Federal Government does not presently have the necessary complete technical data, even on interstate pipeline interconnection facilities, which would enable it to structure a feasible program for transfers of gas from one area to another. One high federal official responsible for energy policy asserted that "the engineering does not exist to move gas around," as could be done with the nationwide or regional electric power grid system or with fuel oil distribution. The Federal Government does not presently have data on state interconnection facilities and, in some cases, even the States do not have information as to their own intrastate connection facilities.

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[9] The referenced EPA cases are discussed in further detail in the STATE PARTICIPATION supplement, *Appendix A*, at A-20 through A-22.

[10] *See also* the NARUC Survey, note 8, *supra*, for specific examples of state agency and industry actions.

Moreover, it was the view of a number of sources that a scheme similar to FEA's program for allocation of fuel oil — with the so-called state "set-aside" for meeting particular local needs or emergencies — would not be feasible in attempting to allocate natural gas because of the physical characteristics of natural gas and the consequent difficulties in the transportation of gas in a nationwide or regional allocation system. We were informed that informal exchanges of gas among interstate pipelines and among pipelines and intrastate distributors do take place. However, it was stated that any system of allocations and transfers would require a complex set of policy determinations for compensation for reallocated gas, and for compensation where higher cost alternate fuels were used as a substitute for natural gas transferred to higher priority uses.

E. ENVIRONMENTAL CONSIDERATIONS

Another subject which was explored during the research effort was the question of whether the promulgation by a federal agency of end-use allocation policies would require the preparation of environmental impact statements under the provisions of the National Environmental Policy Act. The position of the FPC thus far — that issuance of its curtailment guidelines and approvals of "interim" curtailment plans submitted by interstate pipelines subject to its jurisdiction do not require prior environmental impact statements — has been judicially upheld.[11] However, it may well be that environmental impact statements would be required for curtailment actions of a "final" nature. Further, the opinion has been expressed that any end-use allocation plan which contemplated the conversion to other fuels, such as oil or coal, would necessarily have to take cognizance of existing national anti-pollution policies such as are encompassed in the National Environmental Policy Act and the Clean Air Act. Procedures would necessarily have to be designed to accommodate and coordinate the aims of a nationwide natural gas allocation program with the objectives of all such environmental programs, as well as with overall national energy policies.

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[11] *See*, in this connection, Atlanta Gas Light Co. v FPC, 476 F.2d 142 (5th Cir. 1973), and American Smelting & Refining Co. v FPC, 494 F.2d 925 (D.C. Cir. 1974), in which FPC's approval of interim emergency curtailment plans prior to the issuance of an environmental impact statement was upheld. The Commission has also approved non-emergency interim plans without the issuance of an environmental impact statement in *Panhandle Eastern Pipeline Co.*, Opinion No. 754, issued February 27, 1976.

IV. The Immediate Situation

The most recent information obtained from FPC, FEA, and industry sources would appear to indicate that, although projections of curtailments by interstate pipelines in the forthcoming winter months are estimated to be on the increase, a preliminary analysis of the reports filed shows that the impact of natural gas curtailments will probably be offset by alternate fuel supplies during the 1976–77 winter months if weather is normal, absent exceptional circumstances.[12] Nevertheless, the risk of recurring emergencies and the seriousness of the consequences are sufficiently high to warrant early Congressional attention. Such attention is especially required in view of the time involved in the legislative process and the lead time necessary to establish any new program even of a standby nature. In deciding upon a course of action, Congress should be mindful of the many complexities discussed here.

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[12] *See* FPC News Release, No. 22608, September 9, 1976, at 2.

APPENDIX A: STATE PARTICIPATION IN FEDERAL REGULATORY PROGRAMS

Supplemental Report by

William C. Bush

INTRODUCTION

This report summarizes the results of an Administrative Conference staff study investigating selected federal regulatory programs involving varying degrees of participation by state governmental bodies. It was hoped at the outset of the study that it would be possible to draw parallels between existing federal/state schemes and a possible program, to be implemented by the Federal Power Commission, to allocate natural gas supplies — with a view toward recommending appropriate procedures for use in the allocation program. To this time, however, no clear working hypothesis has emerged for the substance of the gas allocation program, so that it is not yet possible to adequately recognize those circumstances where parallel approaches might prove beneficial. It is anticipated that this study, although reaching no firm conclusions on possible procedural features of a gas allocation program, may form a useful basis for the recommendation of procedures at such time as the substance of an allocation program begins to crystallize. Additionally, it is possible that this summary may serve as a beginning for a future large-scale Conference study of federal/state relationships in general.

The staff study has concentrated on eight regulatory programs: five "safety" programs, cable television operator licensing, environmental protection, and petroleum allocation. For each program, the summaries which follow briefly outline the goals and the scope of each program, then explore in some depth those parts of the programs involving state participation. Materials which formed the basis of the study include the Federal program enabling statutes, cases, administrative orders and regulations, and, in some instances, interviews with Federal and/or state administrators familiar with the programs.

Under the heading "Joint Federal/State Activities," six existing procedural methods by which Federal and state regulators may coordinate their activities are outlined and briefly reviewed.

In the last part of this summary, "Evaluation and Analysis," observations are presented on some of the potential problems of joint federal/state regulation as well as on some of the more unusual aspects of a few of the programs.

FEDERAL REGULATORY PROGRAMS

PIPELINE SAFETY

The Natural Gas Pipeline Safety Act of 1968, 49 USC §1671 et seq, calls for the setting of safety standards for interstate and intrastate pipelines, and the enforcement of the standards. The Secretary of Transportation (Office of Pipeline Safety) is the federal administrator.

- § 1672. The Secretary is initially to adopt existing state standards as federal minimum standards. Within two years, the Secretary is to set minimum uniform national standards. The states may set more stringent standards "not incompatible with" federal standards for intrastate pipelines. A state is not allowed to set any standards for interstate pipelines.

- § 1673. A national technical standards committee, including two state commissioners, aids the Secretary in setting national standards.

- § 1674(a). A state agency may administer the federal standards for intrastate pipelines upon obtaining "certification" from the Secretary. Certification requires: (1) state adoption of federal standards, (2) state administration, (3) state recordkeeping, and (4) state sanctions identical to federal sanctions. A state agency is required to obtain annual certification and to file annual reports of its activities with the Secretary. If a state agency fails to obtain certification, the Secretary will enforce federal standards himself.

- § 1674(b). In lieu of certification, the Secretary may make an "agreement" with a state agency for carrying out such of the federal program as the state agency is willing and able to do.

- § 1672(e). Subject to approval by the Secretary, a state agency acting under a certificate or agreement may grant waivers to intrastate pipelines.

- § 1674(c). The Secretary will pay 50% of a state agency's expenses when the agency acts under § 1674(a) or (b) above (re intrastate pipelines), or as "agent" for the Secretary (re interstate pipelines), if the agency satisfies the Secretary that it has performed acceptably.

- § 1674(e). Any federal/state arrangement may be terminated by the Secretary for cause following a hearing.

- § 1676. Whenever the adoption by the Secretary of a federal standard would disrupt local service, the Secretary is to advise the FPC and state gas commission, and give them a reasonable opportunity to grant necessary authorization [to do something which maintains continuity of service].

- A court test affirmed the right of a state, acting as agent for the federal administrator, to tax an interstate pipeline for the purpose of recovering the costs involved in inspecting the pipeline.

- Staff interviews with state officials revealed that state implementation under the Act has been very non-uniform. In one year, one state was responsible for over 90% of all violations reported to the Department of Transportation. The explanation offered for this disparity was that the state Public Service Commission reporting the large majority of violations did a "good job" of carrying out the federal inspection requirements, whereas other states, with overworked and understaffed commissions, did not.

OCCUPATIONAL SAFETY

The Occupational Safety and Health Act of 1970, 29 USC § 651 et seq, calls for setting and enforcing national safety standards for the safeguarding of employees in all industry. Standard setting procedures (§ 655) are customized and exempt from Administrative Procedure Act requirements. During the first two years of implementation, any existing health and safety standards developed by private associations, states, or other federal agencies are to be adopted and promulgated as federal standards. At any time, a specialized rulemaking process may be used to promulgate new standards, and to modify or revoke any standard. The federal administrator is the Secretary of Labor (OSHA).

- § 667(a). States may assert jurisdiction over any subject matter for which there are no federal standards.

- § 667(b). A State may assume responsibility for those areas where federal standards exist by submitting a plan.

- § 667(c). A state plan will be approved by the Secretary whenever: (1) the plan is limited to a single state agency with state-wide responsibility; (2) state standards are "at least as effective" as federal standards; where the state plan impinges on interstate commerce, state standards are "required by compelling local conditions and do not unduly burden interstate commerce"; (3) inspection procedures meet certain criteria; the plan contains assurances of (4) adequate legal authority, sufficient personnel, and (5) sufficient funding; (6) the plan includes a safety program for the state as an employer; the plan requires federal reporting by employers "as if the plan were not in effect"; and the state makes requested reports to the Secretary.

- § 667(d). Rejection of a state plan requires a hearing.

- § 667(e). The Secretary, in his discretion, may keep the federal program in force in a state with a plan for the first three years of the plan.

- § 667(f). The Secretary will monitor state performance and revoke approval of any plan not meeting the criteria of (c) above.

- § 667(g). A state may appeal the Secretary's rejection or revocation of approval of a plan to a Court of Appeals on a substantial evidence test.

- § 667(h). The Secretary may, by "agreement," allow a state to enforce some of the state's own standards on a temporary basis, until the state plan is evaluated or for two years.

- § 672(a)–(f). The Secretary will make grants of 90% of the costs of state programs [not "the plan"] for studies, research, and development regarding safety conditions and administration of safety programs.

- § 672(g). The Secretary will pay 50% of the costs of state administration of the state plan which involve administration of the federal program.

- Regulations for state agreements are in 29 CFR § 1901. Regulations for state plans are in 29 CFR § 1902.

- In an interview with an OSHA official, the staff was informed that twenty-three states have initiated state plans so far. Two states, New York and New Jersey, have terminated their programs due to lack of state matching funds. OSHA operates programs under federal standards in the remaining 29 states. Some fifteen states, which had lengthy prior experience with safety programs, operate programs superior to those run by OSHA.

The staff was told that OSHA finds the largest problem with the federal/state aspect of the program to be the vague criteria for approval of a state plan — "as effective as" the federal program. Clear Congressional guidelines setting forth explicit substantive requirements for state plans are desired by OSHA. It was the opinion of the OSHA official that an all-federal program would be easier to administer, and probably slightly less costly, than current federal/state programs. Duplicative reporting and record-keeping would be eliminated, and federal oversight and approval processes for widely divergent state plans would be unnecessary. Additionally, the staff was told that national labor unions prefer an all-federal system because a centralized process would allow concentration of lobbying efforts. Further, it was said that multi-state employers, currently faced with a multitude of diverse safety requirements in different states, also favor an all-federal uniform set of safety rules.

MINE SAFETY

The Federal Metal and Non-metallic Mine Safety Act of 1966, 30 USC § 721, et seq, generally deals with setting mine safety standards for the protection of the lives of mine workers. The federal administrator is the Secretary of the Interior (Bureau of Mine Safety).

- § 735. A state agency capable of administering a mine safety program which meets certain federal criteria may be permitted to do so following approval of the program and the state agency by the Secretary. The program need only be substantially as effective as the federal program, and need not adopt the federal standards. Regulation will be dual but basically non-coextensive. The state sets and enforces safety standards; the Secretary will only act when potentially lethal conditions exist. The Secretary will monitor the state program for effectiveness, and shut it down if he finds, following a hearing, that it is inadequate. Only one state agency is allowed to have authority in the area.

- § 738. State safety standards may be stricter than federal standards, and as such are not to be construed in conflict with the Act.

- ACUS staff has no further information on the operation or effectiveness of this program.

RAILROAD SAFETY

The Federal Railroad Safety Act, 45 USC § 421 et seq, generally calls for the setting of national safety standards for railroad operation, and for inspection and enforcement. The federal administrator is the Secretary of Transportation.

- § 434. State safety rules regarding railroads remain in force until the Secretary promulgates a rule on a particular subject, then the subject is preempted. A state may adopt a particular state law to cover local conditions, if such law is not incompatible with federal rules or an undue burden on interstate commerce.

- § 435. A state agency may either be certified to, or agree to, carry out surveillance and investigative functions in connection with federal rules. The certificate or agreement may be terminated by the Secretary following a hearing. Federal funds will pay for 50% of the state's expenses. The state agency may "recommend" follow-up action by the Secretary, but does not ordinarily enforce the federal rules.

- § 436. [Ordinarily the Secretary, under § 438, has exclusive power to enforce the federal rules through fines and injunctions.] If the Secretary takes no action at all on a violation, the state agency, within 90 days of the violation, may apply to a District Court for enforcement.

- ACUS staff has no further information on this program.

MEAT INSPECTION

The Wholesome Meat Act of 1967, 21 USC § 601 et seq, in general deals with setting and enforcing standards to protect consumers from adulterated and misbranded meat and meat products. The federal administrator is the Secretary of Agriculture.

- § 661(a). The Secretary is authorized, in his discretion, to "cooperate" with an "appropriate" state agency in developing and administering a state inspection program imposing wholesomeness standards for intrastate transactions in meat at least "equal" to federal standards. Cooperation amounts to technical assistance and training, advice in developing a state program under state law, and 50% federal reimbursement of state expenses. The Secretary may appoint an advisory committee composed of state administrators (one committee for each state) for consultation and for evaluation of the state program.

- § 661(b). The "appropriate" state agency is one with overall state responsibility for coordination of state inspection programs. A municipal agency or other subordinate body is deemed to be a part of the superior state agency. [Note that no "certification" or "agreement" is involved as in the other federal "safety" programs.]

- § 661(c). If a state does not cooperate and implement a plan to the satisfaction of the Secretary, after consultation with the governor of the state, the Secretary shall impose federal standards upon wholly intrastate transactions "to the same extent and in the same manner as if such . . . transactions were conducted in or for [interstate] commerce."

The intrastate scheme is dual. If the Secretary finds that the public health is endangered by a meat processor subject to state regulation, he may impose federal standards and sanctions on the processor. The Secretary will monitor the total state program to make sure it is performing adequately.

- § 678. When a meat processor is subject to federal inspection under direct federal jurisdiction, a state may not impose any standards at all. The field is preempted. Nor may a state inspect a federal regulatee.

- This rather strict separation of authority according to intrastate and interstate criteria is to be contrasted with FDA procedures for inspection of food storage and processing facilities. Where state law also calls for inspections, the FDA local office and the state office may enter into a "memorandum of understanding" which involves pooling data facilities and dividing up inspection assignments. See 41 Fed Reg 22556 (June 7, 1976) for a sample memorandum.

CABLE TELEVISION

The Federal Communications Commission (FCC) has no statutory guidelines for coordinating its regulation of CATV operators with that of the states. The Commission has promulgated rules to handle the situation where a CATV operator must obtain both a certificate from the FCC and a franchise from a local (or state) franchising authority. The Commission describes its efforts as "creative federalism."

- The Commission conditions certification upon an applicant's having obtained a franchise which meets certain requirements. Some of these requirements are: (1) the franchising authority must provide public participation in the selection of the CATV operator; (2) the franchise must provide for full coverage of the geographic jurisdiction of the franchising authority; (3) the franchise fee must not exceed a maximum limit; (4) certain items (preempted by the FCC) must not be included in the franchise agreement at all. The FCC has refused to set specific public participation guidelines for the selection of an operator by the franchisor. The Commission believes that procedural rules for the franchising authority should be determined locally.

- For a number of years, the FCC refused to certificate an applicant presenting a deficient franchise agreement. This resulted in protracted shuffling of the applicant between the FCC and the franchising authority. Presently, the FCC will conditionally certificate an applicant with a deficient franchise by "construing" any franchise to be in compliance with FCC requirements and allowing the franchising authority a brief time to refute the FCC construction. If no dispute develops, certification follows automatically.

- There have been some problems where there is no franchising authority in existence in a locality (a waiver process is provided), and where there exists both a local franchising authority and a state commission which asserts jurisdiction over CATV. In the latter case, the FCC has stated its desire to deal only with a local authority; state "Cable Bureaus" continue to come into existence, however. The FCC will not certificate an operator who presents a satisfactory local franchise agreement if state-level approval is required by state law but has not been obtained by the operator and/or the franchising authority.

- Federal/state allocation of regulatory authority is controlled by the FCC by use of a mechanism called "subject matter preemption." By taking no action on a particular matter, the FCC "allows" unimpeded state regulation of the matter. By announcing preemption of a particular matter and making rules on the matter, the FCC asserts federal regulatory control of the matter. By announcing preemption but not making rules, the FCC allows the matter to go unregulated at all governmental levels. By conditioning operator certification upon the conduct of certain matters by the franchising authority and certain terms in the franchise agreement, the FCC effectively controls the related activities of state regulators.

ENVIRONMENTAL PROTECTION

The Clean Air Act Amendments of 1970, 42 USC § 1857 et seq, call for the Environmental Protection Agency (EPA) to set uniform "primary" and "secondary" air quality standards for the nation, and emission standards for air pollution sources. (Only those portions of the Act dealing with air quality standards will be discussed here.) Primary standards specify the maximum permissible levels in the air of pollutants which are deemed dangerous to health. Secondary standards specify the maximum permissible levels in the air of pollutants which are deemed harmful to welfare. The EPA is charged with seeing that these standards are met throughout the nation by a time certain, and maintained thereafter. The EPA is to specify "Air Quality Control Regions" (AQCRs) — geographical areas which are zones of pollution concentration and which require coordinated efforts to achieve pollution control. An AQCR may extend across state lines, e.g., the New York City Metropolitan Area.

- § 1857c–2(a). Each state has "primary responsibility" for achieving standards within the state boundary by submitting state plans for attainment and maintenance of standards for each AQCR within the State. The portion of a state not designated by the EPA to be an AQCR is itself an AQCR. *Each* AQCR requires a separate plan for *each* pollutant.

- § 1857c. The EPA will pay for two-thirds of the cost of setting up state schemes and one-half of the costs of their operation. A state is entitled to *no* federal funds in a year if expenses in that year do not exceed expenses of the previous year.

- § 1857c–1. The EPA will pay 100% of the costs of advisory agencies set up jointly by two or more states for the purpose of planning the strategy for an interstate AQCR which includes the states. Such an agency must include representation by all states and political sub-divisions in the AQCR. After two years, federal funding is reduced to three-fourths.

- § 1857c–5(a). Each state *shall*, after notice and public hearing, submit state implementation plans (SIPs) for each AQCR in the state within 60 days of the promulgation of a primary standard by the EPA, and within nine months of the promulgation of a secondary standard. The EPA will approve a SIP meeting certain criteria including, inter alia, (1) proper notice and hearing, (2) inclusion of provisions for cooperation with all other states in the AQCR, (3) assurances that the SIP will not adversely affect any other state sharing the AQCR, or any other AQCR in the same state, (4) assurances that the state has adequate enforcement authority and ability, and (5) provisions for revision, following notice and hearing, (a) if the EPA subsequently determines the plan to be inadequate to meet air quality standards, or (b) if the EPA changes the standards, or (c) if the EPA thinks the SIP could be carried out in some better fashion.

- § 1857c–5(c). If a SIP is not submitted from a state, or if a submitted SIP is inadequate, the EPA will, upon consideration of the record of the state hearing, publish a proposed substitute implementation plan. If no hearing was held, the EPA will hold one in the state. The EPA will adopt and promulgate its proposed plan six months after the state plan is due unless the state has submitted an acceptable plan in the interim.

- § 1857c–5(b). The EPA can grant extensions up to 18 months for the *submission* of SIPs implementing secondary standards.

- § 1857c–5(e). The EPA can grant extensions up to two years for the *attainment* of primary standards. The normal period for required attainment is three years. The requirements for extensions for primary standard attainment were clarified in National Resources Defense Council, Inc. v Environmental Protection Agency, 475 F.2d 968 (DC Cir 1973), in which the EPA had granted extensions *prior* to the submission of a SIP.

    (1) The EPA must have the state plan in hand.
    (2) The EPA must have a submission from the governor of the state

asserting the inability of the state to comply. The EPA must make the decision regarding the state's inability to comply based on the governor's submission.
(3) The EPA must determine that the state considered alternatives for compliance, and that the state justifiably concluded that compliance was impossible.
(4) The EPA must determine that the state plan is adequate in those areas which are not granted extensions.
(5) The EPA must determine that the state plan provides for interim control of some sort during the extension period.
(6) Public comments (written submissions) must be received on (a) the governor's proposal for extension, (b) state proposals for compliance, and (c) state proposals for continuing maintenance of the plan.
(7) The EPA must state the reasons for its decisions to approve *or* disapprove state plans, commenting on both public (state) and private (interest group) submissions.

- § 1857c–8(a)(1). [Ordinarily a state will enforce a SIP through use of sanctions created as a part of the SIP under state law.] The EPA may use federal sanctions to enforce any SIP (both approved state plans and substitute EPA plans) by giving notice to the violator and the state. If the violation continues for 30 days, the EPA may issue a compliance order or bring civil suit.

- § 1857c–8(a)(2). If the EPA finds that widespread violations in a state are due to the state's failure to enforce a SIP, the EPA will notify the state. If the situation persists for 30 days, the EPA will give public notice and proceed to directly enforce the SIP without the 30-day notice requirements of § 1857c–8(a)(1) until such time as the state satisfies EPA that state enforcement will be effective.

- The ability of the EPA to compel state action under the Clean Air Act has been litigated in several recent cases, four of which have been granted review by the Supreme Court.

In *Brown v EPA*, 521 F2d 827 (9th Cir 1975), the EPA asserted that it had powers to obtain injunctive relief against the state, to impose a receivership on state operations, to hold a state official in civil contempt with daily fines, and to allocate funds within a state's budget — in order to force the state to enact and implement a federal plan. The Ninth Circuit completely rejected these contentions, holding that sanctions can only be imposed where the state is an actual polluter. The court noted that, whereas Congress may regulate commerce, state governments are not commerce and may not be regulated until they engage in commerce. The court carefully read the Clean Air Act so as to avoid any inference of EPA power to control state governmental functions of legislation and administration.

In *District of Columbia v Train*, 521 F2d 971 (DC Cir 1975), the EPA again attempted to compel a state to enact laws and to administer a federal plan. The D. C. Circuit held that the only thing which the EPA may do, when faced with a situation of state inaction, is to promulgate and implement its own plan using its own resources. The court found a clear intent in the Clean Air Act to require states to administer a federally imposed auto inspection plan and, characterizing this provision as an effort to "commandeer" state officials for federal service, declared this portion of the Act to be an unconstitutional extension of federal power — a usurpation of state sovereignty. In answer to an EPA contention that it would be much more "efficient" to allow the EPA to give orders which the states would carry out, the court stated that efficiency is no justification for an unconstitutional action. However, the court upheld provisions of the EPA-promulgated SIP which called for the state to purchase buses and build bus lanes. Although these requirements can only be carried out through legislative and administrative action, the court characterized the state as a "polluter" in violation of the Act in this instance and thus subject to federal sanctions.

Similar disputes are involved in the other two cases going to the Supreme Court, *Virginia v Train*, 521 F2d 971 (DC Cir 1975), and *Maryland v Environmental Protection Agency*, 44 USLW 2153 (4th Cir 1976). The questions which the Court has been asked to resolve are: (1) whether the EPA can compel a state to administer federal emission standards in a state auto inspection program as a part of a state implementation plan, and (2) whether the EPA can compel a state to take affirmative action to construct bus lanes and to purchase buses as a part of a state implementation plan.

- A national business magazine recently reported that speculation about potential EPA enforcement difficulties has been highlighted in West Virginia where, in August, Governor Moore suspended the state's clean air regulations, in effect terminating state enforcement under the West Virginia SIP. Environmentalists have threatened suit if the EPA does not commence federal enforcement by mid-September. The report stated that West Virginia's position is that the regulations are killing the coal industry, while the EPA, currently unwilling to accept enforcement responsibility, wants to get West Virginia to reevaluate air quality measurement in the state with a view toward a lowering of SIP requirements which might be acceptable to the state.

- In an interview with EPA officials, the staff was told that relations between the states, in implementing the environmental regulations, and the EPA, in promulgating those regulations, have not been especially congenial in the past. In order to improve this situation, it was said that the EPA has initiated and intensified efforts to obtain a closer state/EPA working relationship; the main method has been to bring the states into the rulemaking process at an early stage — prior to the publication of a proposed rule and before the EPA staff develops a firm stance on an issue. The EPA also tries to bring in environmental interest groups at an early stage. A further innovation described by the EPA officials is the assignment of a "lead region" for a project — a particular federal region where the impact of an EPA undertaking will be greatest. The lead region then assembles a working group of interested parties and assumes responsibility for making advance proposals for regulations.

- A recent report in a national political magazine indicated that the EPA has received praise from the states in its implementation of the Safe Drinking Water Act. The chief reason given in the report for the states' attitude is that the EPA has encouraged the National Drinking Water Advisory Council, created under the Act, to actively participate in setting standards, and has followed the advice of the Council to a great extent. The EPA has thus been able to obtain the cooperation of 48 states by the states' assumption of "primacy" for enforcement under the Act. The report noted, however, that the EPA has been subject to criticism from environmentalist groups for allegedly "coddling" the states into assuming primacy by making regulations the states could "live with" instead of tougher regulations (claimed by the environmentalists to be required by the Act) which would be repugnant to the states. There is a suit pending on the issue. The report went on to state that the EPA claims that its reluctance to make stricter regulations in some areas is due to a lack of dependable data, whereas the environmentalists claim that the EPA should protect health by making regulations first and obtaining the data later.

PETROLEUM ALLOCATION

Under the Emergency Petroleum Allocation Act of 1973, P. L. 93–159, the Federal Energy Administration Act of 1974, P. L. 93–275, and Executive Order 11790, the Federal Energy Administration (FEA) sets maximum prices and allocates the distribution of petroleum supplies (except natural gas) throughout the nation. All details of the program are set out in 10 CFR § 202 et seq.

- The general thrust of the federal program (see 10 CFR § 211) is to maintain the flow of petroleum products following a supply disruption which occurred for five months in 1973–74. Subject to many adjustments, each supplier of petroleum products is required to deliver his total supply monthly to his customers on a pro rata basis as determined by deliveries in a pre-shortage base year. The system reaches down to supplies delivered to retailers and to "wholesale consumers" (large buyers) but does not ordinarily touch small retail sales to consumers. Each supplier is further directed to assure that each allocated supply reaches the intended "end purchaser." This could mean that a producer is responsible for getting supplies to a retailer in spite of changes occurring at the intermediate wholesale level. The scheme is monitored by monthly reporting of supplies and deliveries. Any changes must first be approved by FEA, except that terminations or reductions in delivery may be made voluntarily by mutual consent of the parties involved. The FEA keeps track of the supply-demand situation and will move petroleum around as it sees fit to correct imbalances.

- Under 15 USC § 766(d), the FEA may utilize the services of state agencies, with their consent, and reimburse the state agencies as the FEA sees fit, in order to carry out any part of the program.

- Through rulemaking, the FEA has created a "State Office" program in which a state may set up a State Office of Petroleum Allocation within the state to administer a "set aside" program. Small percentages (about 3%) of each month's supply of four petroleum products distributed by each "prime supplier" in the state are set aside from the prime suppliers' federal allocation requirements for allocation by the State Office. The State Office may do any of the following with its set aside volumes:

    (1) On claim of hardship or emergency by an end-user or wholesale-consumer, order the prime seller to deliver the needed product to a wholesale-reseller for subsequent delivery to the hardship claimant;
    (2) Order a prime supplier to release part or all of the set aside volume through his normal distribution channels; or
    (3) Take no action; in such case, a monthly set aside volume becomes part of a prime supplier's monthly supply for the subsequent month.

- The procedure for a hardship or emergency claim is as follows:
    (1) The applicant cannot obtain his requirements from his ordinary supplier, or, if he does not have an ordinary supplier, from two other suppliers who would deliver if they had sufficient product.
    (2) The applicant files for hardship relief and names his supplier(s).
    (3) If relief is granted, the applicant is given a document of assignment entitling him to product from a named prime supplier or a designated local distributor of the prime supplier which may be redeemed for 10 days on presentation to the named supplier. The

State Office coordinates this process by contacting suppliers to assure in advance that the product is available.

(4) A wholesaler-reseller may also apply on behalf of his customer(s).

- A new end-user may apply for an "assignment" of an allocated product (not the set aside) of a supplier under the federal allocation scheme. The State Office does not set allocations, but acts as a screening agent for the FEA, forwarding applications which meet certain criteria to the FEA.

- The State Office also may provide assistance to suppliers or customers in seeking modifications of federal allocation assignments.

- There are numerous requirements for hearings, notices, appeals, etc., detailed in 10 CFR § 205.210, which a State Office is required to follow. A person denied a request for an emergency set aside product or aggrieved by a state set aside order must first appeal to the State Office. A person losing on appeal is entitled to judicial review under § 211 of the Economic Stabilization Act of 1970.

- If a state does not apply to FEA for authority to operate a State Office, there will be no set aside program in effect within the state. There are no provisions in case of "inadequate" operation of a State Office, other than the ability of the FEA to deny funding. The staff was informed by an FEA official that FEA normally supplies 50% of the costs of operation of a State Office.

- The staff interviewed officials from two states who had experience in the operation of State Offices of Petroleum Allocation under the federal program. In one instance, the staff was told that a State Office, rather than follow FEA regulations, had allocated two to three times the amount of petroleum which it was authorized to allocate under its set aside volumes. This State Office even went so far as to print and issue its own allocation forms, and did not bother with required reports to FEA. The state official involved felt that much of the industry in the state would have shut down in 1973–74 if the state had followed FEA regulations.

The other state official testified before the FEA regarding a proposal by FEA for a federal take-over of the State Office set aside programs. The prepared testimony furnished to the staff indicated that the state official is adamantly opposed to federal operation of the local set aside programs due to what was regarded as "insensitivity" and "delay" in the federal administration of the FEA's main allocation program. Additional problems which this second state official mentioned as having caused difficulties for the State Office were: (1) constantly changing federal regulations and (2) failure of the FEA to enforce its own allocation requirements.

JOINT FEDERAL/STATE ACTIVITIES

The purpose of this part is to briefly catalog various forms of joint activities involving federal and state regulators where concurrent jurisdiction over a particular activity exists.

INTERVENTION AS A PARTY OR RESPONDENT

Either regulator may participate as an "interested party" in the official proceedings of the other to the same extent that private parties may do so. The degree of federal participation possible in state proceedings will depend on state administrative law, or the particular state regulatory statute involved, so that there may be some variation from state to state. A general minimum level of participation available everywhere is that either regulator can submit comments where comments are requested.

Some federal statutes (or regulations) specifically require that the state co-regulator be given notice of certain proceedings and/or be made a respondent and/or have the right to intervene as a party. For instance, 42 USC § 2021(1) requires the Nuclear Regulatory Commission (NRC) to notify a state regarding certain NRC licensing activities within the state and to allow an appropriate state representative to participate as a full party in the licensing proceeding.

JOINT CONFERENCES

A "joint conference" is a get-together for discussion of policy formulation or problem solving (but not for official action such as rule making). Although some federal statutes may call for "cooperation and consultation" with state authorities, no statutory basis is required to conduct non-official business.

A statutory basis for holding joint conferences between the Federal Power Commission (FPC) and state regulatory agencies is found in 16 USC § 824(h), and covered by rule in 18 CFR § 1.37(c). As noted earlier, the EPA has adopted a policy of holding pre-rulemaking conferences with state officials who must enforce state implementation plans under the pollution laws.

PARTICIPATION IN RULEMAKING

Under OMB (Office of Management and Budget) Circular A-85, all federal agencies are required, prior to publication, to submit to ACIR (Advisory Commission on Intergovernmental Relations) 20 copies of proposed regulations and organizational changes having a nationwide impact. ACIR will forward the proposals to state and local governmental organizations such as the National Governors' Conference, National League of Cities, etc., and will serve as a contact point for receiving reply comments. Federal activities to which Circular A-85 applies are those which "have a significant effect on state and local governments" and which directly affect:

"a. Interstate relationships,
b. Intergovernmental relationships (e.g., State-local and inter-local),
c. Types of eligible recipients,
d. Designations of agencies within State or local governments,
e. Requirements affecting State or local personnel practices,
f. Organizational, planning, or fiscal activities of State and other governments, or
g. Roles and functions of heads of State or local governments."

An official at OMB told the staff that, although very few federal agencies follow the Circular A–85 requirements, there is currently a movement within the federal government to obtain better federal/state relationships, particularly with regard to federal grant programs, and OMB expects greater implementation of Circular A–85.

ADVISORY COMMITTEES

Either a state or federal regulator may form an official "advisory committee." The committee is composed of knowledgeable persons who can assist the regulator in carrying out his responsibilities by providing useful information and advice. Usually advisory committees are composed of regulatees and/or citizen group representatives and/or experts in the area concerned. Committee composition is often at the discretion of the regulator, but may be determined by statute within certain limits. Procedures regarding federal advisory committees are set forth in the Federal Advisory Committee Act of 1972, 5 USC Appendix 1.

JOINT HEARINGS

Whenever both federal and state regulators must hold hearings on the same subject matter, it is possible for them to do so in the same place and at the same time, thereby avoiding a dual presentation. This process, a "joint hearing," appears to each regulator much like an ordinary hearing. Usually a single record is made. Joint hearings can be a great time-saver for the regulatees where long hearings are required at both the federal and state levels, and for the regulators when federal/state regulatory coordination is a necessity. Joint hearings can also aid in producing a better record than might result from separate hearings, and probably will lead to more consistent results in the regulatory determinations at the state and federal levels.

The holding of joint hearings is discretionary, and the regulators must get together in advance to agree on procedures. Joint hearings are authorized for the FPC in 16 USC § 824h(b), and the corresponding FPC rules are in 18 CFR § 1.37(e). Statutory authorization for holding joint hearings is, however, probably not a necessity. The NRC and the New York Siting Board are considering holding joint hearings regarding the Greene County Nuclear Power Plant (41 Fed Reg 24008), and the NRC has no statutory basis which either requires or permits joint hearings. The NRC asked for comments in the Federal Register regarding the propriety of holding a joint hearing, and for suggestions on procedures, but hearings could probably be held without any official prior action, other than the usual notice of hearing.

JOINT BOARDS

A "joint board" is less a "cooperative" venture and more a means of taking official action involving both federal and state regulators. A joint board is a body, organized under federal law to take federal action, but is composed of some members who are state officials.

Under 16 USC § 824h(a), the FPC may create a joint board composed entirely of state officials. The board, consisting of an equal number of officers from each state affected, has the power of an FPC commissioner who has been appointed by the FPC to hold hearings. Joint board action has such force and effect as the FPC prescribes. By rule, the FPC has prescribed that a joint board can do no more than hold hearings and make recommendations to the FPC. 18 CFR § 1.37.

The FPC refused a request by the state of Ohio to convene a joint board composed of representatives from all states for the purpose of resolving natural gas curtailment problems on a nationwide basis. (RP 75–67.) The FPC's reasons for refusal were:

(1) The board, composed of 48 state officials, would be too cumbersome.

(2) Many states were intervenors in pending tariff proceedings involving curtailment plans and were therefore adversaries.

(3) FPC's current investigation of the upcoming winter gas supply situation should adequately serve the same purpose, and, in any event, should be completed first in order to obtain sufficient data on which to base a nationwide curtailment scheme.

Under 47 USC § 410(c), the FCC is *required* to use a joint board as a hearing examiner with respect to matters involving jurisdictional separation of common carrier expenses and property between interstate and intrastate operations. An FCC joint board is composed of three FCC commissioners and four state commissioners. The state commissioners "participate" in the FCC final determination, but cannot vote.

Under 47 USC § 410(a), the FCC can also convene a joint board composed entirely of state officials (not necessarily commissioners) to act as an examiner on other matters "arising under this subchapter," which seems to include much of common carrier regulation.

Joint boards call for state officials to exercise some federal authority, and therefore require a statutory basis.

EVALUATION AND ANALYSIS

This part of the report presents an analysis of some of the features of state participation in the federal programs summarized above.

UNIFORM NATIONAL STANDARDS

Under the Clean Air Act, the Environmental Protection Agency sets nationwide standards for air quality. Since total air quality in any given geographical area is dependent upon an enormous number of factors — the quantity, type, and concentration of industrial processes, the amount and distribution of vehicle traffic, the local geography, the local climate and prevailing winds, etc. — it is necessary to customize anti-pollution plans for each area of the nation. In order to spread the burdens of devising and implementing plans for the entire nation, and to make use of local community knowledge and state-level expertise, the Clean Air Act calls for local participation in each area in designing and implementing programs for air pollution control — hence the incorporation in the Clean Air Act of the concept of "state implementation plans" for each "air quality control region."

A problem has surfaced, however, from that part of the statutory scheme calling for EPA to reject a state-developed implementation plan found by EPA to be unsatisfactory, and to formulate a substitute federal plan: the substitute plans, in many cases, have not been favorably received by the states and localities initially responsible, under the Clean Air Act, for implementation of the plans. Two interrelated features (one substantive and one structural) of the federal program under which substitute EPA plans are developed would appear to contribute to this unfavorable state-level attitude. First, substitute implementation plans are not required, under the Clean Air Act, to be formulated by balancing a consideration of improved air quality against a consideration of the economic consequences on a state or locality of the requirements imposed by the plan. Second, the federal agency devising a substitute plan does not share the immediate political accountability to local citizens which state and local official entities must bear. At times, federal requirements introduced into substitute implementation plans have been accompanied by the prospect of strong adverse consequences on state budgets and/or local economies. In some instances, this prospect has resulted in direct state-level opposition to a substitute federal plan in the form of litigation contesting the validity of the plan, or in the withdrawal of a state from voluntary implementation of a plan. (There is no statutory requirement for a balancing of economic consequences in state-developed plans either, but it would normally be expected that a state would automatically weave in considerations of practicality in devising a plan to be implemented by the state and having a direct impact on the state budget and local economies.) State-level resistance has led to a second problem: in some instances, federal substitute implementation plans have included requirements of such magnitude (e.g., inspection of all vehicles within a state) that EPA is itself unable to implement the requirements in the event a state chooses not to participate in implementation.

It may well be that these problems stem from a single element in the Clean Air Act: the national air quality standards. Federally determined uniform air quality standards must be met everywhere in the nation. If each air quality control region could decide for itself the level of air quality it desired, each local governmental body would be able to arrive at a mix of air quality, economic effect, and enforcement burden satisfactory to the citizens whose air, jobs, and taxes will be directly affected. Under the Clean Air Act, however, no method has been provided by which a locality can obtain a waiver of an air quality standard, once the standard is set by EPA; a state may at most obtain a two-year extension for compliance upon a "justifiable" showing that compliance would be impossible to achieve.

Two interrelated procedural features for the initial formulation of air quality standards would also appear to contribute to state-level reluctance to achieve compliance with federally formulated standards. First, the statutory scheme whereby common air quality standards for the entire nation are set by a single governmental entity, a federal agency, carries the possibility of creating a situation in which well-organized national interest groups would be able to wield considerably more leverage in advocating particular standards than scattered and divergent local citizen groups would be able to muster in opposing such standards. Second, air quality standards are formulated prior to (and therefore without) any consideration of available effective means of implementation; the timing sequence spelled out in the Clean Air Act calls for EPA to set standards before state-level work begins on implementation plans. The states and localities, therefore, having little concept, at the standard-setting phase of the program, of the effort and cost necessary to achieve compliance with air quality standards, have little incentive to oppose national interest groups in the initial formulation of the standards.

An entirely different atmosphere has apparently prevailed under the Safe Drinking Water Act. An analysis by a national political publication indicates that EPA has utilized its National Drinking Water Advisory

Council, composed of state and local representatives as well as environmentalist representatives, as a "board of directors" in setting national drinking water standards. The publication analysis concludes that, as a result of this closer working relationship between EPA and the states in the initial formulation of drinking water standards, EPA has set standards which the states can "live with," and has achieved a much greater degree of acceptance by those state agencies which will implement the standards. In all probability, state representatives have brought to the advisory council a strong reluctance to accept stringent standards, based on distasteful experiences under the Clean Air Act, and have coordinated the setting of standards with the states' ability economically to achieve compliance. Environmentalists have brought suit against EPA, however, in an attempt to compel EPA to set more stringent standards, notwithstanding both state-level and EPA unwillingness and apparent inability to enforce stricter standards.

The Clean Air Act may be regarded somewhat as a "safety" regulation, and a comparison between the processes for standard-setting and enforcement under the Clean Air Act, and the processes utilized for the other federal safety programs reviewed in the summaries above, reveals some major differences.

Standard-setting for the other federal programs involves either limited interference with local laws, or state involvement in the standard-setting process. Under the Pipeline Safety Act, state standards are utilized as federal standards for two years when uniform federal standards replace them for interstate pipelines only. OSHA derives its uniform national standards by adopting the safety standards of private national trade associations, states, or federal agencies. Under the Federal Railroad Safety Act, diverse state standards set by state law remain in force until and unless preempted by a federal rule. The Secretary of Agriculture sets standards only for meat involved in interstate transactions.

Federal requirements for implementation of these other safety programs by state agencies allow much more latitude for local variation in effectuating national standards than is allowed under the Clean Air Act. States may set standards for intrastate pipelines "not incompatible with" standards for interstate pipelines. State-adopted occupational safety standards need be "at least as effective" as OSHA standards in order for the state to assume local control of the federal program. A state mine safety program need not adopt federal standards, and the entire state program need only be "substantially as effective" as a federal program in the state would be. Although federal railroad safety rules preempt state laws on the same subject, a state may adopt special local laws to cover local conditions if such laws are "not incompatible with" federal rules or an "undue burden on interstate commerce." States may set any wholesomeness standards they wish for meat involved in intrastate transactions, and the Department of Agriculture will impose federal standards only if the public health becomes endangered through lax state regulation. And a state mine safety program will come under federal control only if the state program is so poorly run as to allow lethal conditions to exist.

In each program noted above, there is room for the states "to breathe." Generally, in the areas left to state implementation, the states need not adopt or meet federal standards at all as long as the state program functions fairly well. This situation is to be severely contrasted with that under the Clean Air Act where a state *must* devise a program to meet national air quality standards for *each* pollutant in *every* area of the state, with *no* divergence from federal minimum standards, or else the EPA will take over.

The staff study has not reviewed these other safety programs in depth, and comparisons between them and the clean air program must therefore be made with some qualifications as to the validity of the conclusions to be drawn. Some general observations are in order however. The main reason for the lack of depth in the study of railroad, mine, meat, pipeline, and occupational safety programs is that there have been very few court cases reported dealing with standards under these programs. This is to be contrasted against the large number of court clashes between the EPA and various states or environmentalist groups, relating directly to state implementation of national air quality standards.

This is not to say that all of these other federal programs have gone without criticism. OSHA has received a fair amount of criticism from its regulatees and the states, but this appears to be largely related to objections to the content of some of the national consensus standards. Apparently OSHA-set standards are not ordinarily objectionable, as, according to an OSHA official, it is the usual practice of states implementing the federal program to adopt federal standards verbatim, even though standards of equivalent effectiveness would satisfy the statutory requirement. The official stated that there was often a fair amount of dispute over whether a state program was "as effective as" a federal program, but that this uncertainty apparently revolves around the effectiveness of state inspectors in discovering violations and the vagueness of the statutory standard for approving a state program.

Although uniform standards do not play as central a function in the other federal programs reviewed in this study, some notes on the roles of national standards in CATV regulation and petroleum allocation are in order. The FCC has consistently denied requests from interest groups for the setting of national standard procedures and substantive rules for the selection of cable operators by local franchising authorities. It is the belief of the FCC that the proper mix of services and prices is best decided by the locality to be served, and not by a distant federal regulator. The FCC also recognizes that the resources and customs of various local governments differ greatly, and has therefore refused to require more than a general "public participation" standard involving openness and fairness in the procedures to be used for operator selection. This can amount to a referendum, a town meeting, or a formalized rulemaking proceeding with notice, comment, and judicial review. The operator may be picked by competitive bidding, negotiation, or selection by an official body.

The FCC has required national uniformity in some areas. After some local communities initially set technical specifications for their cable systems, the FCC preempted the field, permitting the franchise to contain no greater requirements than FCC-set minimum technical specifications. The franchising authority is allowed to assess a franchise fee no greater than the costs incurred in local regulation or three percent of operator revenues, whichever is less. And the local authority is not allowed to set any limitations on the uses or prices of leased channel services offered by the CATV operator. From the viewpoint of the franchising authorities, these standards represent *maximum* limitations on their ability to regulate, rather than minimum requirements which they must meet.

The FCC's rationale in setting maximum uniform limits on local regulation is that more restrictive regulation adds nothing to the quality of the services rendered and acts as an unnecessary burden on the development and innovativeness of the CATV industry. Uniform technical standards allow CATV operators to purchase standardized operating and test equipment, thereby reducing the costs and enhancing the reliability of the cable system. Maximum fee limitations both strengthen the viability of the cable industry and discourage the growth of local regulatory bureaucracy. Free market operation of leased channel services allows this feature of cable systems to develop according to the diverse desires of its users, unimpeded by stultifying regulations imposed before the service has taken on any formalized structure.

One feature of CATV regulation bears some resemblance to the FEA's "set aside" program. The FCC requires each franchising authority to operate a "cable complaint bureau." This is an office in the local government which invites and receives complaints from cable subscribers, forwarding the complaints to the operator and the FCC. The FCC has set out very few requirements for a complaint bureau, only that there must be one and that all subscribers must be informed of its existence and be able to contact it easily. The purpose for requiring local complaint bureaus is to smoothe out the rough edges of the regulatory program and to serve as an early warning system, alerting the regulators to developing problems.

An FEA State Office serves much the same purpose by allowing local people to slightly modify an FEA allocation system and thereby eliminate or reduce disruptions caused by federal administration. State officials administering a set aside program are given nearly free rein in deciding how to distribute their set aside portions; the only federal requirement is that state assignments be based on "hardship" or "emergency" requirements, and the State Office is allowed to determine what this means. The State Office also acts as an aide and advocate for applicants who wish to enter (or modify their entitlements under) the federal program by accepting and screening applications, and forwarding the applications to the FEA along with state recommendations.

The Natural Gas Pipeline Safety Act also contains a provision for taking some of the cutting edge off of the federal standard-setting program. Whenever the adoption of a federal standard by the Department of Transportation would disrupt local gas service, DOT is required to notify the FPC and the state gas commission, and to give these regulators a reasonable time to arrange for continuous service.

The problems which have surfaced under the Clean Air Act relating to the "national air quality standards," as well as the large degree of diversity for setting and implementing national standards under the other federal programs reviewed here, suggest some questions which should be considered in the formulation of federal regulatory standard-setting programs. These questions are:

(1) Are there subjects for which national standards are appropriate, and subjects for which national standards are ill-suited?

(2) If national standards are suitable to a subject, can procedures be applied which will minimize any adverse effects of the imposition of uniformity on an otherwise diverse nation?

  (a) Can the stringency of the standards be adjusted for those who suffer severe adverse impacts; can the process be designed to reveal and redress the grievances of those unduly injured by uniformity?

  (b) Can the timing of the setting of the standards be adjusted so that the impact of the setting of the standards may be first evaluated; would a trial period with interim (repealable) standards be appropriate?

(3) Where national uniformity is a goal, to what extent can local differences be accommodated?

  (a) Under what circumstances should non-participation by a state result in a federally imposed program in the state?

  (b) To what extent and under what circumstances should a state or sub-division be allowed to "opt out" of a federal program?

  (c) To what extent and under what circumstances should a state or subdivision be allowed to partially participate in a program involving uniform federal standards?

(4) Where uniform nationwide standard-setting is a goal, in what circumstances should such standards be set by Congress rather than by an administrative agency?

(5) Where uniform standard-setting broadly affects the entire population, what are the most appropriate procedures to assure effective and meaningful public participation in the formulation of policy and of procedures for its implementation?

(a) Can state (or state organization) participation in federal agency standard-setting effectively provide a representative national public input?

(b) What should be the nature and scope of participation by citizen organizations and other special interest groups in the standard-setting process in order to assure an adequate and balanced expression of diverse viewpoints?

FUNDING FOR STATE PARTICIPATION

Most of the programs reviewed here have provided federal funding to the states as follows:

(a) complete or near complete federal funding for the start-up expenses in establishing a state plan to administer a federal program, and

(b) fifty percent federal funding for expenses incurred in the on-going administration of the federal program.

Although this study has turned up little information from which to relate the effectiveness of administration to the level of funding involved, some limited observations may be made.

In many instances, states are unable or unwilling to raise the matching funds required for on-going administration of a federal program. This may be especially true when the program appears to be of minor importance, or where some aspects of the program are not well-received locally.

Encouragement of state participation in a federal program may be highly desirable for a number of reasons. State administration may be a great help in smoothing out the rough edges of a federal program by allowing local interests to be adequately recognized. It has been suggested by an FEA official that states stand to benefit from participation in the petroleum allocation program and therefore should be willing to bear the costs. Whereas this may be a proper evaluation for the situation where *no* program will exist in a state which chooses not to participate (welfare grants are another example), in the case where the program will be run by the federal agency if the state does not administer it, other factors require consideration.

State participation may actually reduce the total cost of a program by utilizing existing state resources, and thereby eliminate the need for separate federal field offices and personnel. Additionally, although a state may not be willing to administer a particular federal program without 100% federal funding, the state may still wish to continue some level of state regulation in the area. In this case the result may be greater total costs for the state and federal programs and occasional clashes due to the incompatibility of the programs. Where a federal program is run by a state, however, the state administrator of the federal program will ordinarily be the state office charged with running any related state regulatory program. (This can be required by the federal legislation.) Therefore, better coordination of the overall regulatory picture within the state may be expected.

On the basis of this study, it cannot be concluded that full federal funding for state participation in federal regulatory programs is, in and of itself, always desirable, or even sometimes desirable. It may be concluded, however, that, where state implementation is regarded as preferable to federal implementation, substantial federal funding should be strongly considered as a means for encouraging state participation.

STATE SET ASIDE PROGRAMS

The only federal program in this study which bears any substantive resemblance to a natural gas curtailment and allocation scheme is the FEA's petroleum allocation program. As mentioned in the introduction to this report, the substance of a possible gas allocation program is not presently firm enough to draw any definite parallels. Some general observations regarding the FEA program may be made, however, with a view toward possible usefulness in natural gas allocation.

First of all, the FEA does not make use of the states in the major part of its basic allocation program. The state "set aside" program is implemented by the states on a voluntary basis (voluntary in the sense that the federal government will not impose a set aside program on a state which does not want one), and serves the purpose of redressing grievances and eliminating particular hardships caused by the broad federal allocation scheme. The states are thus allowed some latitude to "fine tune" the federal program, but are given neither the authority to determine the main operating characteristics of the program nor the responsibility for its implementation.

Most hypotheses for natural gas allocation programs have been formulated on the basis of distribution according to the types of uses to which the gas will be ultimately put — the "end use." In contrast, FEA allocates petroleum supplies on a pro rata system founded on the distribution prevailing in a "base year." Each petroleum supplier is required to deliver the same percentage of his available fuel to each of his customers as he delivered during the base year. As customers come and go, or their requirements change, the percentages are adjusted by FEA. A state operating a set aside program is treated somewhat as a customer of all of the suppliers in the state, and is entitled to three percent of each supplier's total deliveries. The state set aside amount, then, reduces all customers' entitlements by three percent. The state, however, does not buy and then resell or consume its set aside volumes. Instead, the State Office reallocates the volumes to customers with emergency requirements. The effect on any one customer in the normal distribution pattern is small — the state set aside volume, if totally reallocated to other customers, will diminish his FEA-set entitlement by only three percent. The State Office, on the other hand, has at its disposal a fairly large amount of fuel, three percent of the total state supply. The State Office is therefore able to take care of a large number of small needs as well as to correct a few large discontinuities in the federal program.

It has been suggested that pro rata allocation of natural gas would not work well, especially in an emergency shortage situation. There is some evidence that the FEA scheme did not work well during the 1973 oil embargo, resulting in large-scale disruption in the distribution system. It should be noted, however, that the scheme was instituted *after* a severe shortage developed, at a time when any allocation scheme could have been expected to be temporarily inadequate. It should also be recalled that, when the shortage in natural gas first developed in 1970, the natural gas pipelines and their customers voluntarily adopted pro rata arrangements, and the customers began to adjust by arranging for alternate fuel supplies.

Although pro rata allocation of natural gas can work well at the level of large-scale supply and distribution, a similar scheme cannot be carried through to the final residential customer because the flow of gas to a customer must be continuous or cut off, but cannot be reduced proportionate to supply. This is due to physical constraints of the delivery system, in which a reduced concentration of gas can become mixed with air and thereby become dangerously explosive. Although it is not difficult for large gas consumers to tolerate a complete shut off and switch to alternate fuels or temporarily suspend their operations, it is postulated that a reduction in supply to residential users would require sudden shut-downs of the entire residential distribution network, followed by lengthy turn-ons, both dangerous in themselves. The first goal of any allocation program, then, is to assure full deliveries to residential customers. There is no direct parallel in the allocation of liquid fuels which are stored in individual tanks for each customer. A car with a lowered gasoline supply simply is driven less. A home short on fuel oil gets colder. Neither explodes. This is not to say that severe hardships may not result from an immobilized car or from a cold home.

Because of these delivery constraints, if curtailments of natural gas deliveries were to be made on a pro rata basis, straight proportional cut-backs to all users would not be feasible. A modified pro rationing which assured adequate line pressure in all parts of the distribution networks would be required. Such a scheme, however it might be formulated, would probably result in a final distribution of gas supplies not greatly dissimilar to an end-use priority allocation program which also assured the continuity of residential deliveries. No system of curtailment or allocation can, in the final analysis, avoid those physical constraints of natural gas distribution which require that deliveries to any one customer cannot be reduced beyond a certain amount without, for safety reasons, being cut off completely. In any case, curtailments are the result of a shortage in supply below demand, and hardships and/or emergencies may be expected to occur for some customers whose supplies are reduced or cut off.

If a program of natural gas allocation is continued (and possibly enlarged), it is conceivable that a state "set aside" program could be effective in helping to eliminate any hardships or emergency situations resulting from natural gas delivery shortages, and that such a program could be operated in a manner similar to the FEA State Office program. If federal control were extended to intrastate distributors, allowing a state regulator to reallocate a small fraction of the state's gas supply could help to reduce the adverse effects caused in the state by changing conditions and special local circumstances unaccounted for by the federal program, allowing the program to function more smoothly and relieving the federal regulator of much of the burden of the day to day operation of the program. On the other hand, if federal jurisdiction extended only to interstate pipelines, and the federal government did not preempt the field of natural gas distribution, there would seem to be no need for any special arrangement with the states since state regulators already have (or can obtain) the authority to distribute gas supplies within state boundaries according to the states' best interests.

APPENDIX B: BIBLIOGRAPHY

Organizational Note

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Under each heading, sources are presented in the following order: (1) statutes, (2) regulations, decisions, and orders of administrative agencies (listed chronologically by docket and/or order number), (3) court decisions, (4) analytical reports and studies (listed alphabetically), (5) Congressional hearings, (6) articles from periodicals and journals (listed alphabetically), and (7) all other sources (listed alphabetically). In each instance, the citation presented represents the form of the material actually available to the research team, rather than a "standard" citation. All materials listed (or copies thereof) are on file at the Administrative Conference.

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APPENDIX C: INTERVIEW REPORT

Supplemental Report by

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INTRODUCTION: THE INTERVIEWEES

The Administrative Conference research team conducting the study on *Procedural Implications of Administering Emergency Shortages of Natural Gas*, led by Max D. Paglin, interviewed fifty-six persons during the summer of 1976 for the purpose of benefiting from the experience and expertise of those familiar with the subject matter of the report. Thirty-six individuals were interviewed in person in Washington, D. C., and telephone conferences were held with an additional 20 persons. Virtually all of the personal interviews were attended by the three members of the research team, Messrs. Paglin, Bush, and Henderson; the telephone conferences were conducted by Mr. Paglin. This supplemental report describes the personal interview process and presents a summary of interviewee responses in a question-and-answer format. *Appendix D* to the project report contains both an alphabetical listing of all persons contacted as well as a listing of all interviewees arranged according to present and past organizational association.

Those personally interviewed were selected on the basis of present and past affiliation with (or contact with) federal and state governmental organizations involved either with natural gas regulation or with the operation of a federal regulatory program implemented by state agencies. Eight interviewees were officials at the Federal Power Commission (FPC), and seven had previously served in an official capacity there. Six persons interviewed held active positions on state-level regulatory or advisory bodies, while five had prior state regulatory experience. Interviewees affiliated with non-governmental organizations included representatives of the National Governors' Conference (NGC), the Interstate National Gas Association of America (INGAA), and the National Association of Regulatory Utility Commissioners (NARUC). Those interviewees selected for experience in federal/state regulatory programs included officials at the Environmental Protection Agency (EPA), the Federal Energy Administration (FEA), the Federal Communications Commission (FCC), and the Occupational Safety and Health Administration (OSHA). Four interviewees had direct experience with federal/state programs at the state implementation level. Seven of the interviewees, all but one having prior active governmental regulatory experience, are currently in private law practice.

INTERVIEW FORMAT AND METHODOLOGY

At the beginning of each personal interview session, the research team presented the following hypothesis regarding a possible federal natural gas allocation program to the interviewees:

1. There is a likelihood of a nationwide natural gas shortage of "emergency" proportions.
2. There will be a Congressional determination of the need for statutory enactment of federal authority to control the distribution and use of natural gas on a nationwide basis.
3. Congress will provide "standby" authority to a federal agency (most likely the FPC), such authority being activated during periods declared to be an "emergency" by the President.
4. The federal agency thus empowered will have the authority over interstate and intrastate natural gas:
    a. to allocate natural gas supplies at all levels of transportation, distribution, and use;
    b. to order the construction of physical interconnections among natural gas pipelines;
    c. to order transfers of natural gas supplies among pipelines and distributors;
    d. to develop criteria for "equitable" economic and geographic distribution of natural gas; and
    e. to coordinate federal allocation activities with other energy related federal agencies and state commissions.
5. The federal allocation program will be carried out with the assistance of state governments by a process in which:
    a. the federal agency will promulgate criteria, policies, and procedures for the allocation program, following consultation with state officials, through APA rulemaking;
    b. states will develop plans for the implementation of the federal program within each state in accordance with federal standards;
    c. state plans will be submitted to the federal agency for approval; and
    d. upon approval of a state plan, the federal agency will delegate authority to the state to administer the federal program in the state.

Each interviewee was also given a description of the activities and authority of the Administrative Conference. The prior study and report to the Conference by Mason Willrich on the *Administration of Energy Shortages* was briefly outlined. It was stressed that neither the Conference nor the members of the research team were advocating the federal allocation program hypothesized, and that the research study was being made only so that the Conference could be prepared to recommend appropriate procedures to Congress in the event Congress chose to create a similar program. The research team carefully emphasized that the authority of the Conference extended only to reviewing and recommending matters of procedure, and that any substantive features of a possible federal allocation program would be discussed only for the purpose of obtaining a grasp on the subject matter as a necessary foundation for examining procedural considerations.

Following the initial presentation by the research team, each interviewee was asked questions regarding his personal experience and opinions relevant to the operation of a possible federal natural gas allocation program. No standardized question-and-answer format was utilized. Occasionally an interviewee responded to the statement of the hypothesis with lengthy personal observations. More often, specific questions were put to the interviewees. As might be expected, questions asked by the research team during the initial interviews were of a general nature, whereas questions in the later interviews were more sharply focused on specific troublesome points which emerged with some clarity over the course of the interviewing span. In many instances, a response received in a prior session was utilized to stimulate discussion in a subsequent interview.

Immediately following each interview, a member of the research team prepared a memorandum of the interview from notes taken by all members of the team. These memoranda, which form the basis for the summary of comments, are on file at the Administrative Conference.

SUMMARY OF INTERVIEWEE COMMENTS

This part summarizes, in a question-and-answer format, the comments made by the interviewees. As noted earlier, some persons volunteered information without being asked specific questions, and often the issues discussed were not addressed in the same order or in precisely the same formulation as is presented here. The questions utilized in the summary, however, serve to identify the major queries made by the research team, as well as to organize the responses according to the various topics covered. For obvious reasons, all issues were not addressed by each interviewee.

No interviewee has been personally identified in the summary for three reasons: (1) it is felt that direct personal attribution would add little to the associational attribution utilized, e.g., "an FPC official," rather than "Commissioner Doe of the FPC"; (2) the comment summaries are not the direct words of the interviewees; and (3) the interviewees were not informed that their statements were for identified publication.

1. WHAT IS THE STATUS OF THE CURRENT FEDERAL REGULATORY PROGRAM IN NATURAL GAS?

An FPC official described the federal regulatory program (as it involves natural gas allocation) roughly as follows:

The FPC regulates interstate natural gas pipelines. FPC authority does not extend to intrastate pipelines, non-pipeline sources of gas, most other types of energy sources, or users of gas after the gas has left an interstate pipeline. Although there are hundreds of interstate pipelines, thirty to forty individual pipelines account for 95 percent of the total interstate transmission of gas. As an entity, a "pipeline" is a corporate form, and includes all of the interstate facilities of a particular pipeline firm.

Under FPC Order 431, each interstate pipeline is required to file a tariff setting forth a plan for curtailment of service during a period of supply shortage. The tariff may be (1) approved as submitted, (2) rejected as insufficient on its face, or (3) suspended and set for a hearing for lawfulness upon a motion by the Commission or an intervenor. In practice, all tariff filings are suspended and receive a full trial-type hearing.

There are no firm legal standards for curtailment. FPC has issued a policy statement (18 CFR § 2.78) spelling out a satisfactory curtailment scheme based on nine priorities determined by the end-use of the gas. If a pipeline follows FPC policy, the pipeline's plan is presumptively lawful. If a pipeline has a curtailment plan differing from FIC policy, the pipeline must justify the lawfulness of its plan against a general public interest test. An intervenor may challenge the lawfulness of a plan which conforms to FPC policy, as well as a plan which does not. In the end, most approved curtailment plans are largely based on FPC's end-use criteria. The two other main schemes in use are "pro rata" curtailment and curtailment according to pre-existing contract arrangements. A final plan may be a combination of all three schemes.

FPC pipeline curtailment plans do not, in any manner, take state boundaries into account. FPC considers only the pipeline and the customers served by the pipeline, regardless of location as if the states did not exist. [End of description by FPC official.]

Another FPC official mentioned in a subsequent interview that the nine priorities for curtailment in 18 CFR § 2.78 have been reduced in practice to five categories by eliminating the "firm-interruptible" distinction in several of the categories. Present FPC policy on curtailment is to be found, it was said, in the current filing of the El Paso Natural Gas Company, FPC Order No. 697.

An INGAA official suggested the research team investigate a petition filed by the State of Ohio requesting FPC to convene a joint board of representatives from all states in order to consider the question of curtailment and allocation policy. The team obtained all FPC filings on the matter (FPC Docket No. 75–67, *see* BIBLIOGRAPHY). FPC denied the request by Ohio. Ohio has brought suit to appeal the denial, according to the INGAA official, in the D. C. Court of Appeals.

2. IS THE CURRENT FEDERAL END-USE CURTAILMENT PROGRAM EFFECTIVE IN REACHING END USERS?

An FPC official answered this question largely in the negative. His explanation was that interstate pipelines do not (except in rare situations) deliver to end-users; pipelines deliver to distributors which in turn deliver to end-users or to other distributors. FPC has no control over the actions of the distributors or the end-users. A distributor may have an entirely different plan for curtailment to his customers. Many distributors are subject to regulation by state public service commissions (PSCs), and many PSCs have adopted curtailment requirements different from those of FPC, and, in some instances, have no curtailment requirements at all. Municipally owned distributors, further, are not subject to state PSC control, and there are many of these. Additionally, end-users are not subject to regulatory control (at least for curtailment purposes), so that a particular end-user may use whatever gas he is able to obtain according to his own individual interests.

The following example of a possible curtailment situation was constructed by the research team from information supplied by FPC personnel:

A particular distributor has customers who use 10% of the distributor's total supply for boiler fuel. (Boiler fuel is the lowest FPC priority use and therefore the first to be curtailed by interstate pipelines.) In a mild shortage situation, the distributor's allotment from his interstate pipeline supplier may be cut 10%. But to the distributor, all this means is that he has 90% of the total gas he needs to meet his commitments. He may proceed to curtail his customers on a pro rata basis, so that all users are cut back 10%. Or the distributor may have other sources (including other interstate pipelines) from which he can make up his shortfall, thereby operating at 100% capacity. Or the distributor may curtail his boiler fuel end-users. But a particular end-user may use only 50% of his non-shortage requirements of gas for boiler fuel. If he is curtailed 100% of his boiler fuel use, he then receives 50% of his total requirements, as he sees it, and he may decide (1) to turn off his boilers, (2) to keep his boilers going and shut down his other uses, or (3) to apportion his gas in any manner between boiler fuel use and other uses. He may, in fact, have arranged for alternate fuel capability, or for a substitute supply of natural gas from a non-curtailed source, so that he feels no shortage at all. The net effect of "boiler fuel" curtailment at the interstate pipeline outlet may be that either (1) natural gas is not used for boiler fuel, (2) natural gas is not used for some other end-use, or (3) there is no effect on end-use at all, i.e., no shortage is felt by an end-user. [End of example.]

FPC personnel, as well as most others interviewed, agreed that what has been happening in practice is that alternative (3) in the example (no shortage) has been the general case due to self help on the part of distributors and end-users. One instance was mentioned by FPC personnel of a particular pipeline which, according to calculations based on a model non-shortage year, should have been in a 50% curtailment situation, with curtailment occurring at all priority uses including residential heating uses. But in fact no user was going without his full requirement of gas.

Another FPC official stated his belief that most large natural gas customers once using interstate gas for boiler fuel have already converted to alternate fuels. He would not expect a large increase in the available interstate supply for other uses if the remaining boiler fuel users converted.

3. WHAT HAS BEEN THE HISTORY OF REGULATORY ALLOCATION OF NATURAL GAS BY STATE GOVERNMENTS?

A former state PSC official said that his state's experience under the existing federal allocation program had been "satisfactory" in that the state had been able to obtain its "fair share" of gas. The state, with a very active PSC, had instituted its own allocation program for intrastate gas in 1971. The program was formulated by notice and comment rulemaking by the PSC and promulgated by administrative order. The PSC had augmented its program through public education on conservation measures. Part of the state program called for a ban on the use of decorative gas lighting; it was said that such measures, although directly contributing little to conservation, were important to make the program visible. It was stated that the PSC received "hundreds" of applications for exception from its program.

An official currently at the same state PSC revealed that the state was not presently willing to comply with FPC curtailment guidelines. The PSC policy has been to protect jobs in the state, and the official declared his belief that FPC has ignored the local economic impacts of establishing strict end-use priorities. Industrial curtailment was said to be acceptable, as long as it is feasible and does not put an entire town out of work at the same time. A distinction was drawn between shutting off a particular industrial user in a big city, and shutting off another industrial user who is responsible for the entire economy of a small town, or who operates a factory in a seasonal industry. Under such a situation, that PSC would consider curtailing residential use first; 300 homes were once cut off in order to keep a local factory going. Later, in a time of sharply reducing gas pressure, the PSC decided to shut off all of a large metropolitan county. Fortunately, the pressure began to increase just before reaching the critical level, and such drastic curtailments were not necessary. However, it has been decided that certain metropolitan areas will be completely cut off in the future if local gas distributors suffer a dangerously critical shortage. Such a state policy was said to result from practical, as well as equitable, justifications. When a shortage develops, it is easy to cut off the few large industrial users first; they will normally turn off their gas after a phone call from the PSC. The next curtailment priority includes perhaps more than 10,000 smaller industrial users; only some of them will voluntarily shut off their gas lines. The PSC and the distributors could not reach the rest in time to do any good; thousands of valves all over the state would be involved, and the PSC does not know where they all are located. However, only a few main valves control all of the gas entering large metropolitan areas. Thus, when speed of action is a prime consideration, it was said to be much more feasible to shut off entire large communities than it is strictly to follow the detailed FPC curtailment priorities.

It was further related that this PSC has been striving to prevent such drastic turn-off situations from occurring through a combined effort of conservation and local gas supply development. The PSC has cut back on allowing future residential connections (but not completely since heating oil delivery is not available in all areas of the state) and has reduced residential gas demand by seven percent through conservation measures that include strict insulation requirements and modified building construction codes. At the same time, industrial gas use has been increased in the state (in order to attract businesses and to protect jobs) despite dwindling interstate pipeline supplies. This increase in industrial use was said to have been achieved by utilizing the conserved residential gas for industrial purposes, by increasing the production of natural gas within the state (supplying one percent of the state's demand), and by developing LNG and SNG facilities (supplying, respectively, two and five percent of the state's demand).

A somewhat similar picture of state regulation in another state was described by a lawyer representing local distributors in the state. He said that the state PSC had encountered difficulties operating under FPC mandated curtailments, and stated a belief that the PSC's major problem in allocating gas within the state results from the fragmentation of the state's gas industry. Nineteen distributors and one intrastate pipeline are regulated by the PSC. Each of the distributors has, over the years, become oriented to a particular type of customer, and therefore to a particular end-use; some serve primarily low priority users while others serve primarily high priority users under FPC's classifications. Since the state's two interstate pipeline suppliers are both heavily curtailed, each local company in turn must implement curtailments. For those distributors serving primarily low priority industrial customers, the picture has been dismal as most of their gas has been curtailed, and little flexibility remains for reallocation by the PSC to suit local economic needs. A diversity of load in a larger distributor (one with a broad cross-reference of end-users) would allow greater flexibility for the PSC to reallocate gas to important industries. Such a reallocation of natural gas would have been desirable during the past two winters, it was said. On the other hand, it was said that the winters have been of such a mild nature that gas distribution could have operated on a pure contract curtailment basis, with turn-offs only for interruptible customers; firm contracts, even for industrial customers, could have been honored. It was also noted that this PSC encourages the development of supplemental gas supplies by allowing a pass-through of development costs by the utilities to their customers, including costs for exploration.

An official from a producer state indicated that his state created a PSC only this year, and has not been active in allocation programs. It was said that over 90% of electricity in the state is generated by the use of gas boilers, and that the cost of conversion of all of the generators to alternate fuels has been estimated to be $14 billion. The only existing state allocation program calls for a 20-year gradual phase-out of large gas-fired boilers, with a 10% reduction in gas deliveries for such purposes in the first year. It was stated that state courts in the producer states have not looked favorably on regulatory modifications to existing contractual commitments.

An FPC official agreed that boiler fuel use of natural gas is still quite common in producing states where large electric utilities and industrial processes were constructed in reliance on the dependable supply of intrastate gas, and further have no easy means of conversion to alternate fuels. Although noting that a process of orderly, long-term conversion of boiler fuel uses to alternate fuels has begun in one state, the official expects stiff opposition on the part of the gas producing states to any federal proposal to speed up the conversion process for the benefit of other parts of the nation.

A former FPC and state PSC official advised the research team that the FPC priority curtailment program had actually grown out of state allocation programs.

A lawyer with PSC practice experience predicted that weakness of natural gas expertise at the state level will eventually insure state adoption of FPC curtailment priorities.

4. DO YOU HAVE ANY GENERAL ATTITUDE TOWARD THE HYPOTHESIZED FEDERAL ALLOCATION PROGRAM WHICH IS AIMED AT CONTROLLING THE DISTRIBUTION OF NATURAL GAS FROM THE WELLHEAD TO THE END-USER?

At the outset it must be stated that this question was never specifically asked of the interviewees. Almost all interviewees, however, came forth with spontaneous comments reflecting their overall personal opinions regarding a nationwide federal allocation program. All comments which illustrate such general opinions and attitudes have been collected under this question heading. In many instances, interviewees opposed to the hypothesized program volunteered ideas of their own for handling the allocation (or non-allocation) of natural gas.

Several FPC staff members stated a view that FPC end-use control would be "disastrous." Their reasons: (1) self help is largely curing the shortage situation; (2) end-use control (which could result in a user's self help created source being allocated to someone else) would completely destroy the incentive for self help and create a real shortage; (3) the desires of communities and regional areas regarding the allocation of "their" gas supply are highly diverse and do not coincide with FPC priorities in many, if not most, instances — control by the federal government would be intensely resented. In short, it was said that nationwide end-use control is not needed, and, if exercised, would make the situation worse and perhaps intolerable.

An interviewee with prior FPC and state PSC experience expressed strong reservations about the prospects for success of any federal program reaching the distribution or burner tip level, and offered his own suggestion: during the time of a natural gas emergency shortage, the federal government's role would be limited to allocation among the states according to the present set of federal priorities; the states would then be free to distribute all gas destined for delivery within their respective borders as each state sees fit. This suggestion, he argued, is both practical and efficient since, he felt, the states know best their individual peculiar needs and capabilities. Under such a program, the burdens of failure and the incentives for success would fall directly on the administering states. Further, his suggested program, in its simplest form, it was said, would eliminate the need of federal certificates of compliance and other bureaucratic enforcement procedures. In his judgment, the PSC on which he had served would have no difficulty operating such a program.

A second former FPC and state PSC official expressed essentially identical views. An FPC official similarly stated that authority to order interconnections and gather information from pipelines should be the extent of federal involvement.

An FEA official, although reluctant to involve the federal government further in natural gas allocation, said that he would support a few existing federal curtailment priorities, and suggested the possible dedication of gas from newly discovered fields to the interstate market. A second FEA official said that the major governmental emphasis should be directed at increasing the total natural gas supply rather than at allocating inadequate supplies. He believed that self help can alleviate current gas distribution problems without the need for "gross governmental action," and that a promise of governmental gas transfers would destroy incentives for self help.

A state PSC official said that the federal government is not close enough to local situations to recognize the impacts of the implementation of federal regulation. He thought that the states need to retain (or acquire) sufficient flexibility to protect local economic growth and to sustain energy development. He declared that his state, as well as several others, could be expected to strongly oppose any legislative proposals for extending federal regulatory power over natural gas. An official from a producing state pointed out that his state has enacted a law forbidding the interstate sale of gas from state-owned lands if a shortage exists in any market within the state.

Many of the interviewees (or the organizations they represented) supported price decontrol of natural gas sales as the only solution to delivery problems. A former FPC official stated his personal view that FPC should not be given authority to allocate gas either between pipelines or at the distributor or customer level, such "emergency" powers having a tendency to become permanent. He traced the current problems in gas supplies directly to regulatory controls, specifically price controls. The shortage, he predicted, will disappear if price deregulation occurs; price controls should be removed gradually, however, in order to avoid a large shock effect on the market. Until price controls are removed, he would favor FPC allocation of natural gas on the contention that pricing and allocation authorities must go hand in hand and should not be divided among administrators. He also proposed allowing voluntary transfers and purchases of natural gas by pipelines without the restrictions imposed by Sections 4 and 7 of the Natural Gas Act (requiring certification and just and reasonable prices). A 1973 case, Consumer Federation of America v Federal Power Commission, he pointed out, had imposed these restrictions. He advocated the removal of any threat of reversal in court so that pipelines would be encouraged to engage in self help measures.

An official currently at FPC agreed that the existing federal regulatory program has caused difficulties in gas distribution. He would personally prefer the elimination of federal pricing restrictions on gas sales, and would favor limiting FPC's regulatory authority to the setting of transportation rates.

An official of NGC supplied the research team with an NGC resolution calling for price decontrol of natural gas. Rather than advocating a free market in natural gas, however, the resolution also calls for national legislation clamping broad controls on uses of natural gas, imposing excess profits taxes on producers, and asking for strenuous enforcement of antitrust laws against natural gas and other energy companies.

A representative of a state Governor's Energy Council stated that the official policy of the Council calls for price deregulation coupled with an extension of the FPC allocation progam to regional distributors. The

Council staff, it was said, has recommended extending federal regulation to the intrastate market so as to control natural gas end-uses, including a complete ban on boiler fuel uses. The Governor himself was said to favor price regulation.

An FEA official favored legislation lifting regulatory pricing controls so that interstate pipeline companies would be able to bargain for gas used for boiler fuel in the producing states. An INGAA representative favoring price decontrol thought that a three to four year period would be required for price deregulation to significantly ameliorate the present delivery problems.

Both a present FPC official and a former FPC official thought the hypothesized program was workable. Both, however, suggested alternatives for increasing gas supplies in the interstate market including conditioning federal off-shore leases on end-use restrictions, forcing producers to market all their gas rather than using it in their own industrial processes, confiscating gas leases for failure expeditiously to explore for and produce gas, and taking (by the federal government) lease royalties in gas rather than in money.

Only two interviewees, both FPC officials, enthusiastically endorsed the concept of total federal control of gas supplies. One official contended that natural energy supplies were "national resources," and their control could not be left to the states. There could never be an effective national policy regarding natural gas, he felt, with intrastate gas going unregulated by the federal government. He would not, however, be satisfied with emergency powers; rather he perceived a need for authority permanently vested in a federal agency sufficient to coordinate national energy goals on a continuous basis.

The other FPC official, pointing to an FPC staff document showing that there was a finite limit to national gas supplies, said that there would be a permanent federal management problem in allocating this limited resource. Price deregulation, he observed, although bringing supply and demand into balance, could not increase the total amount of gas in the ground.

5. IF A NATIONWIDE END-USE ALLOCATION PROGRAM WERE TO BE INSTITUTED BY CONGRESS, SHOULD IT BE UNDER EXCLUSIVE FEDERAL CONTROL, OR SHOULD IT BE A JOINT FEDERAL/STATE EFFORT?

Most of the interviewees addressed this issue by accepting the hypothesized program as "possible." Only a few had specific comments.

An FPC official suggested Congressional incorporation of the present FPC curtailment priorities into a statute requiring distributors to deliver gas in accordance with those priorities. Any minor adjustments and exceptions to the priorities would be developed through adjudication at

FPC. The power to administer such legislation would be vested in a federal agency which in turn would delegate its authority to the states. State reporting requirements would serve to keep the federal agency informed of state-level activities; state action could be reviewed by the federal agency in evidentiary show-cause hearings. The federal agency would be able to obtain direct injunctive relief against distributors, thereby avoiding any necessity for the federal government to attempt to compel particularized state enforcement.

A second FPC official stated that FPC could not effectively manage the natural gas industry on a nationwide scale. A third FPC official thought that FPC could operate a nationwide allocation program given a large enough bureaucracy, but said that the states could handle the implementation more effectively. A fourth FPC official voiced an opinion that, if a nationwide program extending federal priorities to the states were to be instituted, it would be possible and preferable for Congress to set guidelines compelling the states to carry out the national plan. He would not like to see a system which involved FPC heavily in the day-to-day workings of state regulatory programs. He did not think that Congress would be capable of reaching agreement on the setting of specific priorities for a nationwide allocation program, and that such a task would have to fall to the regulatory process.

An INGAA official, noting that interstate pipelines typically pass through five to twelve states, stressed a belief that any significant role of the states could lead to a "hodgepodge of conflicting interests." He felt that the federal government should have sole authority over interconnections and transfers.

A state official, citing dissatisfaction in his state with FEA's implementation of its petroleum allocation program, endorsed federal/state implementation of a natural gas allocation program.

A state PSC official, although favoring a consolidated national energy program, said his PSC would be willing to implement a federal program which included: (1) built-in incentives for state energy conservation and development, including federal curtailments on a fixed base profile for at least ten years; (2) an equitable compensatory scheme for displaced gas; (3) federal requirements that curtailments be based on an extensive profile, including an analysis of the energy needs and economic necessity of each factory and machine; (4) certification requirements for state programs specifying collateral conservation measures such as stiff building codes; (5) exception provisions providing maximum flexibility to the states both in administering the federal priorities and in achieving conservation goals; (6) prohibition of certain uses of natural gas, including advertising and decorative purposes and heating for swimming pools; (7) a narrow definition of the "national defense" exemption from curtailment so as not to exempt virtually every manufacturer in the state.

A former state PSC official suggested a splitting of implementation authority in which the federal government would handle all high volume users of gas, such as power plants and heavy industry, while the states would have direct responsibility for low volume users, such as residential customers and smaller commercial firms.

6. WHAT WOULD BE AN APPROPRIATE MANNER FOR STATES TO PARTICIPATE IN THE INITIAL FORMULATION OF A FEDERAL/STATE ALLOCATION PROGRAM?

An NGC representative said that state governors will insist on having some input, perhaps in the form of a board with representation by the states. He contended that good public relations, which could be enhanced by such participation, would be very important in making the program operate smoothly. He claimed that state governors, rather than PSC officials, are the better spokesmen for the needs of the states. A second NGC representative agreed with this position, and stated that NGC can act as spokesman for the governors, operating through task force recommendations of NGC committees subject to approval by the NGC plenary of all governors. He advocated regional organization of any allocation program where regions are defined by areas with common problems, rather than by geographic location.

A former NARUC official said that NARUC should accompany NGC as representatives of state positions. He thought that this would provide a more balanced blend of political and practical factors.

A former FPC and state PSC official said that NARUC should not be given any special input. He contended that NARUC does not necessarily represent a unanimous view of the states on regulatory matters; there is, he said, no unanimity among the states. He was of the opinion that NARUC, NGC, and individual state PSCs and governors could all adequately participate in the formulation of an allocation program through ordinary notice and comment procedures.

One interviewee suggested that all states served by a particular pipeline devise curtailment programs together with FPC. Individual variances in the programs would then be requested through petitions to the state PSCs. An NGC representative also suggested some form of joint hearings to establish federal curtailment priorities.

An FPC official pointed out problems with the joint hearing concept. It would not be reasonable, he felt, to expect cooperation among state governments in a joint determination, since the interests of the states are inherently adversarial. He further noted the possibility of ex parte problems arising from the fact that all interested parties are currently engaged in adjudicatory curtailment tariff proceedings at FPC. A former FPC official characterized a recent petition by the State of Ohio for the creation of a 48-state joint board (*see* BIBLIOGRAPHY) to resolve curtailment problems as "totally unworkable."

A state official said that his state had very limited resources for participation in federal proceedings and had not taken part in any ratemaking proceedings at FPC. The state had, however, entered curtailment hearings for the purpose of protecting farmers in remote rural areas receiving gas for irrigation purposes from interstate pipelines.

7. WHICH STATE-LEVEL AGENCY WOULD BE MOST APPROPRIATE TO ADMINISTER A JOINT FEDERAL/STATE ALLOCATION PROGRAM?

An FPC official with state regulatory experience was in favor of state PSC administration. He was of the opinion that there would be complicated political issues involved in the allocation of a desirable resource and that it would be better to have political criticism directed at an "independent" agency. He further pointed out that a state PSC, as contrasted to a state governor's office, was more likely to already have the ratemaking power, data base, legal resources, and existing jurisdiction to administer a federal/state program.

A former state PSC official agreed that state administrators of an allocation program should be removed from the political process. He felt that a state governor's office should not be in charge of administration at the state level.

A former FPC official was in favor of state administration through state governor's offices. An FEA official anticipated a lack of cooperation among the states and felt that administration by governor's offices would result in a better coordinated overall program.

A state PSC official advocated the creation of state "energy boards" under the governor's offices to coordinate gas, oil, coal, and nuclear uses within each state as the appropriate state-level administrative agency. An NGC representative suggested councils of energy advisors to state governors representing the diverse interests of utilities, business, conservation, energy, and environment, not necessarily as the administrative agency for an allocation program, but to aid in achieving better organization and cooperation at the state level.

8. COULD EXISTING STATE UTILITY COMMISSIONS EFFECTIVELY ADMINISTER A FEDERAL/STATE ALLOCATION PROGRAM?

Many interviewees pointed to large differences in the capabilities of state PSCs. A state PSC official, noting that his state had a highly active and well-staffed PSC, said that some states had no PSCs at all, while some other states had PSCs with very small staffs and broad jurisdictions beyond the management capability of the staffs.

An interviewee with broad regulatory experience said that the quality and expertise of state PSCs often leave much to be desired. He thought that, in many instances, the staffs, which he claimed to be small, underpaid, and politically appointed, would not be able to withstand the additional burden of implementing a federal allocation program.

A state official said that experience with a PSC dominated by utility interests leads his state Energy Council to prefer strong federal guidelines if the PSC is to implement a federal allocation program. A lawyer with PSC practice experience also mentioned weaknesses in natural gas expertise at the state level.

9. WOULD A STATE "SET-ASIDE" PLAN, IN WHICH EACH STATE IS ALLOWED TO REALLOCATE A SMALL PORTION OF GAS WITHIN THE STATE, BE A USEFUL FEATURE OF A NATIONWIDE FEDERAL ALLOCATION PROGRAM?

A former FPC and state PSC official, basically opposed to the proposition of increased federal control, first suggested the possibility of a set-aside program to the research team. He believed that such a program would provide needed flexibility for some local control and modification of federal priorities.

A former FPC official favoring increased federal control also felt that a state set-aside program would be a beneficial aspect for a federal program reaching intrastate distributors.

An official presently at FPC observed that a state set-aside could be beneficial to the states, and the possibility of withdrawal of set-aside privileges could serve as a sanction to encourage proper administration by the states of the federal program.

A state official with FEA "State Office" experience who favored detailed priorities felt that a state gas set-aside would be a useful feature. A state PSC official also with FEA State Office experience who was opposed to extended federal control was generally favorable to the prospect of a state set-aside program for natural gas, but was pessimistic about the likelihood of the set-aside amount being large enough to allow for local necessities.

Some of the interviewees questioned the feasibility of a set-aside program in natural gas, mentioning that the storage requirements for liquid petroleum as contrasted to natural gas were quite different, and that the concepts involved in a liquid petroleum set-aside program probably could not be carried over to a program in natural gas. One interviewee believed, however, that set-aside gas volumes could be stored in the pipelines if necessary, and that a state set-aside program would be physically manageable.

A representative of NGC described the initial formulation of the State Office set-aside program in petroleum allocation as having grown out of a conference between state governors and the President. He was of the opinion that the petroleum set-aside program had worked quite well.

10. WHAT IS KNOWN ABOUT THE CAPABILITY FOR TRANSFERRING GAS AMONG THE VARIOUS PIPELINES AND DISTRIBUTORS?

An INGAA representative stated that an extensive system of voluntary interconnections now exists among interstate pipelines, although he did not think that there was complete data on interconnections, including those with intrastate pipelines, in any one compilation. None of the interviewees was aware of a complete set of data on interconnections, especially at the intrastate level which many stressed would be essential to the operation of a program to move gas from one area to another. INGAA, which represents twenty interstate pipelines accounting for approximately 90% of all gas transported interstate, had some interconnection data on file from its members. One such filing for a single pipeline, represented to be typical of all pipelines, indicated the geographic location of 80 interconnections with 16 other interstate pipelines and one intrastate pipeline. The INGAA representative offered two examples in which the interconnection network had been used to voluntarily transfer gas in times of emergencies from one region of the nation to another. It was added that there might be a need for some additional interconnection construction if complete transferability of gas is required. Such a system would have to be sensitive to problems peculiar to the industry, such as temperature variations from one end of a pipeline to the other.

A former FPC official was of the opinion that the present system of pipeline interconnections was probably sufficient to deal with the transfers contemplated by the hypothesized federal allocation program. He suggested utilizing a private computer organization, Network Analysis, which had performed a satisfactory evaluation of the nationwide electric power grid for FPC, to examine the capabilities of the natural gas pipeline interconnection network.

An official presently at FPC said that FPC either had at its disposal or could easily obtain information on interconnections involving interstate pipelines. He also said that the Office of Pipeline Safety of the Department of Transportation had data on interconnections of intrastate pipelines. He felt that there might be a need for more interconnections in the producing states in order to carry out a nationwide program involving transfers.

A second FPC official informed the research team that the recent FPC Order of July 20, 1976 (*see* BIBLIOGRAPHY), calls for interstate pipelines to supply interconnection data. However, he stated, more information would be necessary for FPC to be capable of ordering transfers, such as the actual capability (volume and pressure) for effecting a transfer and details on the moment to moment operation of the pipelines. He predicted that analysis of the data received from the July 20 Order by FPC will require at least a year.

11. WHAT PROBLEMS ARE ASSOCIATED WITH COLLECTING AND ANALYZING THE DATA NECESSARY FOR A NATURAL GAS END-USE ALLOCATION PROGRAM?

A state PSC official criticized FPC for its present insufficient data collection which, it was claimed, did not allow FPC to be aware of the economic effects of its curtailment plans. A former FPC official agreed that current data does not provide FPC with knowledge of the effect of natural gas regulation. He suggested that a central federal data agency might be a good idea, but submitted that FPC would need to retain the ability to independently obtain its own specialized reports.

An NGC representative stated a position concurred in by several other interviewees that problems have resulted from a lack of comparability of data obtained from various sources. Many states he said, collect data on gas use in a format different from that needed by FPC. He claimed that the imposition of uniform data collection requirements on the states would penalize those states which had to convert to federal standards. Some states, it was said, might need to operate two separate data files, one for federal and one for local use.

A state PSC official observed that there were strong incentives for the states to do a poor job of data collection for a federal program; the more accurate the data, the more likely the state will have its gas supplies reduced. An FPC official agreed that such was a possibility and commented that he had little faith in the accuracy of the information FPC had received from local distributors. He mentioned that large boiler fuel use had been made the lowest FPC priority because it was the easiest to accurately identify. He also stated that accurate data would be required for the operation of a state set-aside program if such a program were to be equitably operated.

Another FPC official noted that FPC is quite limited in its data collecting powers and must ordinarily obtain information through its jurisdictional pipelines. Additional information has been obtained through FEA cooperation, it was said, but FEA has shown reluctance to release information obtained on a promise of confidentiality. A link between FEA and FPC computers was said to have been recently established. A third FPC official, commenting on the data received in response to the FPC Order of July 20, said that over seven million pages of distributor data had been collected and that it would be at least a year before all the information could be fully assimilated with other information and be made useful.

A fourth FPC official told the research team that a staff report on the information obtained from the Order of July 20 will be prepared shortly but that he did not expect the report to add much to the picture of the interstate delivery situation beyond what is presently known to FPC. There has been, he stated, very little participation in the proceedings by the states, intrastate pipelines, and local distributors. He believed that this lack of participation was due both to a lack of interest in the proceedings and to a "wariness" of federal control of the natural gas industry; this same reluctance to submit to governmental control, it was said, has also been felt by state regulators.

This same official said that, in order to construct a workable plan for control of the natural gas distribution network, FPC needs distributor data on "temperature sensitive" loads — those loads which vary in relation to local climatic temperature. Although distributors must use this data themselves in order to plan their operations, the distributors, exempt from federal jurisdiction, have been quite uncooperative in supplying this data to FPC. Further, although such data forms the basis for customer rate determinations, the state regulators responsible for local rate setting do not obtain the data either. The official suspected that the state regulators take the word of the local distributors about cost allocations, and therefore such data would not be produced unless a challenge to the rate allocation basis was raised.

The research team was further informed by this FPC official that FPC has devised a "static" model of the entire interstate distribution system — from producer to customer — for the year 1974; a model for 1975 is being constructed. Each model indicates what happened during the year as regards gas which flowed through interstate pipelines. The models do not incorporate gas not subject to federal jurisdiction (about 40% of the total gas distributed) and therefore do not reflect the overall nationwide distribution pattern. The research team was provided with a copy of the 1974 static model.

The same FPC official said that FPC needs a "dynamic" model of the distribution system; such a model would indicate the capabilities of each part of the system, and could be used to predict the impact on one part of the system caused by a reallocation to gas in another part of the system. In order to construct such a model, it was said, the dynamic characteristics of the system, including temperature sensitivity and end uses, would have to be known. The research team was told that FPC, not having this necessary information, is conducting studies aimed at generating empirical data (rather than distributor-supplied data) to use in its dynamic model. The model thus constructed is only expected to be a rough approximation to the actual performance capability of the interstate distribution network. Again, the dynamic model will not include solely intrastate distribution and thus will not simulate overall nationwide performance capability.

A former FPC and state PSC official gave the research team his opinion that FPC has greater authority to gather accurate information on end-uses than it has been willing to exercise.

12. IN WHAT MANNER WOULD ENVIRONMENTAL CONSIDERATIONS AFFECT A NATURAL GAS ALLOCATION PROGRAM?

Several interviewees raised the possibility that allocation implementation measures might trigger a requirement for environmental impact statements.

One FPC official was of the opinion that National Environmental Policy Act requirements would have to be faced both by FPC and by states implementing a federal allocation program. He mentioned that a standard environmental impact statement had been generated by the FPC staff for another program, and suggested that a similar arrangement would be necessary to implement an allocation program.

A former FPC official said that there should not be a requirement that environmental impact statements accompany FPC approvals of curtailment plans. Impacts, he said, are impossible to predict since a curtailment plan cannot control the type of replacement fuel substituted for natural gas. He told the research team that FPC has been required to develop environmental impact statements for "final" curtailment plans by a court decision, but that the result has been FPC issuance of "temporary" and "interim" plans which do not consider environmental factors.

13. HOW WOULD OTHER ENERGY-RELATED FEDERAL PROGRAMS AFFECT A NATURAL GAS ALLOCATION PROGRAM?

An FEA official stated that the objectives of FPC in making more gas available to consumers, FEA in reducing dependency on imported fuels, and EPA in preventing further contamination of the atmosphere have often been conflicting. A former FPC official advocated stripping FEA of its authority over LNG, SNG, and other direct substitutes for natural gas, and giving control over all forms of gas-type fuels to FPC.

An FPC official stated that the regulation of natural gas should be coordinated with activities of other energy agencies in order to develop a coherent national energy policy. An NGC representative felt that there was not so much a national energy problem as there was a need for a national energy program. He said the authority for setting rates and administering such a program should be vested in a central federal agency, but that the development of such a program should come from state and regional sources. The federal government, then, would be responsible for coordination of regional policies and overall administration of the energy package.

A state PSC official proposed the creation of a new super energy agency with authority to restructure nationwide energy supply and demand. Such an agency would plan and execute a single national energy program involving oil, gas, coal, nuclear, water, and all new forms of raw energy supplies. His new agency would not have ratemaking, safety, or licensing functions (which would remain with existing agencies), but would have the authority to allocate energy supplies and enforce conservation measures.

14. WHAT OTHER PROBLEMS MIGHT BE ASSOCIATED WITH A NATURAL GAS ALLOCATION PROGRAM?

All remaining interviewee remarks regarding natural gas allocation have been placed under this question heading.

An FPC official said that, if the federal government fails to adequately address the area of states rights in recognizing self-determination for local issues, probably no better solution to gas delivery problems could be had than now exists.

An FEA official said that FPC has not allowed excess capacity to be included in pipelines' rate bases, and so pipelines were constructed only with sufficient capacity to deliver contracted-for amounts of gas, resulting in an inability today to transfer large amounts of gas around the nation.

The question of compensation for deprived purchasers if their contracted-for gas is involuntarily transferred to others worried many of the interviewees. A former FPC official suggested that the issue of compensation be settled clearly by legislation.

For many interviewees, the question was not who receives gas and who does not, but rather who receives cheap interstate gas and who pays for more expensive intrastate gas or gas substitutes. A state PSC official offered an illustration from his state which had initiated active programs of SNG production and LNG importation at considerable expense to the state's ratepayers. As a result, the state has increased its industrial gas supply by more than seven percent. However, this increased supply comes at $5 per MCF as contrasted to a maximum of $1.42 per MCF for interstate gas. If an "equitable" allocation of gas supplies were to be made and interstate gas were taken from this state and then given to other areas of the nation which had not instituted local measures to improve their own supply shortages, the result would be that the industrious and innovative state would end up paying three to four times as much for its locally developed supplies, and have, in the end, no more gas than it would have had if it had made no effort to improve its position.

This same PSC official also explained that a state can be penalized by its conservation efforts. By reducing residential consumption of natural gas for the purpose of having more gas available for industrial uses, a state will rearrange its end-use profile so as to place more gas in lower priority classifications. Upon a reevaluation of the end-use profile, FPC will reallocate this conserved gas to other states which have sustained high residential use. An FEA official suggested that the prospect of obtaining emergency allocations of gas would only tend to postpone conservation and conversion efforts which, he said, have been occurring in recent years.

Several other interviewees also noted these disincentives to conservation and self help. Some suggested that end-use profiles, based on a "model year" not be reevaluated often. A ten year period was thought by some to be a minimum term required to allow local measures to be undertaken without fear of reversal.

Another concern voiced by a state PSC official was that those states with better staffed and more active PSCs could be penalized in an allocation program as a result of their more effective implementation. A former PSC official from the same state was worried about the possibility of voluminous data collection and reporting requirements which might be thrust upon PSCs by a federal/state program. He did not approve of the prospect of states being required to justify their allocation activities to the federal government.

Only one interviewee, an FEA official, commented about federal funding for state implementation of a gas allocation program. He stated that participation was in the interests of the states, and that federal funding should be unnecessary.

An FPC official stated that FPC is considering the concept of "end-use pricing" — charging more for gas put to "inferior" uses so as to discourage such uses. Such a program, it was said, could achieve the objectives of end-use allocation if the inferior uses are voluntarily terminated. It was noted, however, that, as lower priority uses are discontinued, the rates paid by the remaining customers would have to be raised so as to permit full investment recovery by the pipelines. A former state PSC official advised the research team that New Jersey had instituted a pricing mechanism for allocation purposes, although no details were known about New Jersey's program.

15. IS A "SHORTAGE" IN NATURAL GAS EXPECTED IN THE NEAR FUTURE?

An FEA official and two FPC officials all agreed that information currently available indicates that impacts from predicted curtailments should be offset by alternate fuel supplies during the coming winter heating season, and that there will be no shortages of emergency proportions if temperatures are no colder than average this winter.

16. WHAT HAS BEEN THE EXPERIENCE IN OTHER AREAS INVOLVING FEDERAL/STATE REGULATORY PROGRAMS?

An NGC representative said that NGC actively participates in FEA energy programs and has a standing agreement with FEA calling for consultation with NGC on anticipated FEA actions at the FEA staff review level. The research team was given a memo on NGC Energy Task Forces outlining a four-step procedure for cooperation with FEA.

Other responses involving federal/state programs have been incorporated in Appendix A, *State Participation in Federal Regulatory*

Programs, under the headings PIPELINE SAFETY, OCCUPATIONAL SAFETY, ENVIRONMENTAL PROTECTION, and PETROLEUM ALLOCATION, and will not be repeated here.

APPENDIX D: LIST OF INTERVIEWS

ORGANIZATIONAL LISTING BY AGENCY OR ASSOCIATION

FEDERAL POWER COMMISSION

Commissioner Don S. Smith
Dr. S. William Yost, Chief, Bureau of Natural Gas (BNG)
Frederick Cornelius, Chief, Systems Operation Division, BNG
Gordon Grant, Assistant General Counsel
Joseph Solters, Case Manager, BNG
*James Inglis, Staff, BNG
Louis Mendonsa, Staff, BNG
Robert Szekely, Staff, BNG
*Joseph Zwerdling, Chief Administrative Law Judge
George Lewnes, Administrative Law Judge, former Asst. G. C.
*William Webb, Public Information Officer
*Catherine Terry, Secretary to Commissioner Smith
John N. Nassikas, former Chairman
Joseph C. Swidler, former Chairman
Lee C. White, former Chairman
Leo Forquer, former General Counsel
John Mathais, former Assistant General Counsel
George Bonner, former Deputy Chief, BNG
Alan J. Roth, former Trial Attorney

FEDERAL ENERGY ADMINISTRATION

*William G. Rosenburg, Assistant Administrator
Dr. Samuel Tuthill, Assistant Administrator
J. Lisle Reed, Director, Oil and Gas Division
William Brennan, Acting Deputy Dir., Intergvmntl. Relations

ENVIRONMENTAL PROTECTION AGENCY

Lynne Robinson, Office of Intergovernmental Relations
Tony Cortese, Standards and Regulations Division
Ray LaSala, Office of Planning and Evaluation

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Barry White, Assoc. Assistant Secretary for Regional Programs

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*Those individuals indicated above with an asterisk were interviewed by telephone. An alphabetical listing of all persons interviewed, with a description of their present and former associations, follows the organizational list.

FEDERAL COMMUNICATIONS COMMISSION

Jerrold L. Jacobs, Deputy Chief, CATV Bureau
Samuel M. Sharkey, Public Information Officer
*Steven Effros, former Division Chief, CATV Bureau

NUCLEAR REGULATORY COMMISSION

*Daniel Head, Member, Atomic Safety & Licsg. Bd. Panel (ASLBP)
John Frye, III, Law Associate, ASLBP
William O. Doub, former Member, AEC (predecessor agency)

OFFICE OF TELECOMMUNICATIONS POLICY-EXECUTIVE OFFICE OF THE PRESIDENT

*Greg Skall, Attorney, General Counsel's Office

NATIONAL SCIENCE FOUNDATION

*Edward Kelly, Program Manager, State Government Programs

SECURITIES AND EXCHANGE COMMISSION

*Commissioner Philip A. Loomis

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

*Wayne Anderson, Executive Director
*David Walker, State Planning Officer

NATIONAL GOVERNORS' CONFERENCE

Edmond Rovner, Legislative Director
Edward Helminski, Director of Energy Programs
James Martin, Assistant Legislative Director
*Richard Rodgers, Director for Administration

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

*Paul Rodgers, Vice-President and General Counsel
William O. Doub, former Member, Executive Committee

STATE OF ARKANSAS

Don S. Smith, former Member, PSC

STATE OF CALIFORNIA

John Mathais, former General Counsel, PUC

---

*Those individuals indicated above with an asterisk were interviewed by telephone. An alphabetical listing of all persons interviewed, with a description of their present and former associations, follows the organizational list.

STATE OF MARYLAND

William O. Doub, former Chairman, PSC, former People's Counsel, former Member of Board, NARUC, former Member, Advisory Committee to FPC

STATE OF NEW YORK

George Bonner, Director of Gas Division, PSC
Joseph C. Swidler, former Chairman, PSC
Alan J. Roth, former Commissioner, PSC

COMMONWEALTH OF PENNSYLVANIA

*Louis J. Carter, Chairman, PUC
William B. Harral, Exec. Director, Governor's Energy Council
David Barrish, Counsel, Attorney General's Office
Betty Burston, Assistant Fuel Allocations Officer
*Jack Sensenick, Governor's Representative — U.S. Capitol

STATE OF TEXAS

Douglas Corbett, Energy Counsel, Office of State-Fed. Relations
Robert C. Finley, Energy Counsel, Office of State-Fed. Relations

AMERICAN GAS ASSOCIATION

*George Lawrence, Vice-President for Governmental Relations

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

Jerome T. McGrath, Vice-President and General Counsel

ATTORNEYS AND OTHER UTILITY REPRESENTATIVES

William O. Doub, of the firm of LeBoeuf, Lamb, Leiby & MacRae, Esqs.
*George Freeman, of the firm of Hunton and Williams, Esqs.
*Lawrence Gall, Vice President, Transcontinental Gas Pipeline Corp.
John Mathais, of the firm of Baker and Botts, Esqs.
John N. Nassikas, of the firm of Cox, Langford and Brown, Esqs.
*William H. Penniman, of the firm of Sutherland, Ashbill and Brennan, Esqs.
Alan J. Roth, of the firm of Spiegel and McDiarmid, Esqs.
Joseph C. Swidler, of the firm of Leva, Hawes, Symington, Martin and Oppenheimer, Esqs.
Guy Tripp, of the firm of Hunton and Williams, Esqs.
Lee C. White, of the firm of White, Fine and Verville, Esqs.

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*Those individuals indicated above with an asterisk were interviewed by telephone. An alphabetical listing of all persons interviewed, with a description of their present and former associations, follows the organizational list.

ALPHABETICAL LISTING OF INTERVIEWEES

Wayne Anderson	Executive Director, Advisory Commission on Intergovernmental Relations.
David Barrish	Counsel, Attorney General's Office, Commonwealth of Pennsylvania.
George Bonner	Director, Gas Division, Public Service Commission, State of New York; former Deputy Chief, Bureau of Natural Gas, FPC.
William Brennan	Acting Deputy Director, Intergovernmental Relations, FEA.
Betty Burston	Assistant Fuel Allocations Officer, Governor's Energy Council, Commonwealth of Pennsylvania.
Louis J. Carter	Chairman, Public Utilities Commission, Commonwealth of Pennsylvania.
Douglas Corbett	Energy Counsel, Texas State Office of State-Federal Relations.
Frederick Cornelius	Chief, Systems Operation Division, Bureau of Natural Gas, FPC.
Tony Cortese	Standards and Regulation Division, EPA.
William O. Doub	Of the firm of LeBoeuf, Lamb, Leiby and MacRae, Esqs.; former Commissioner, AEC; former Chairman, Public Service Commission, State of Maryland; former Chairman, Federal Energy Regulation Study Team; former Member, Advisory Committee to FPC; former People's Counsel, State of Maryland; former Member, Executive Committee, National Association of Regulatory Utility Commissioners.
Steven Effros	Former Division Chief, Cable Television Bureau, FCC.
Robert C. Finley	Energy Counsel, Texas State Office of State-Federal Relations.
George Freeman	Of the firm of Hunton and Williams, Esqs., counsel for utility companies in FPC and NRC proceedings.
John Frye, III	Law Associate, Atomic Safety and Licensing Board Panel, NRC.
Leo Forquer	Former General Counsel, FPC.
Lawrence Gall	Vice-President, Transcontinental Gas Pipeline Corp.
Gordon Grant	Assistant General Counsel, FPC.
William B. Harral	Executive Director, Governor's Energy Council, Commonwealth of Pennsylvania.
Daniel Head	Member, Atomic Safety and Licensing Board Panel, NRC.
Edward Helminski	Director of Energy Programs, National Governors' Conference.
James Inglis	Staff Member, Bureau of Natural Gas, FPC.
Jerrold L. Jacobs	Deputy Chief, Cable Television Bureau, FCC.
Edward Kelly	Program Manager, State Government Programs, National Science Foundation.
Ray LaSala	Office of Planning and Management, EPA.
George Lawrence	Vice-President, Governmental Relations, American Gas Association.
George Lewnes	Administrative Law Judge, former Assistant General Counsel, FPC.
Philip A. Loomis	Commissioner, SEC.
James Martin	Assistant Legislative Director, National Governors' Conference.

John Mathais	Of the firm of Baker and Botts, Esqs.; former Assistant General Counsel, FPC; former General Counsel, Public Utilities Commission, State of California.
Jerome T. McGrath	Vice-President and General Counsel, Interstate Natural Gas Association of America.
Louis Mendonsa	Staff Member, Bureau of Natural Gas, FPC.
John N. Nassikas	Of the firm of Cox, Langford, and Brown, Esqs.; former Chairman, FPC.
William H. Penniman	Of the firm of Sutherland, Ashbill and Brennan, Esqs., counsel for General Motors in FPC proceedings.
J. Lisle Reed	Director, Oil and Gas Division, FEA.
Lynne Robinson	Office of Intergovernmental Relations, EPA.
Paul Rodgers	Vice-President and General Counsel, National Association of Regulatory Utility Commissioners.
Richard Rodgers	Director for Administration, National Governors' Conference.
William G. Rosenburg	Assistant Administrator, FEA.
Allan J. Roth	Of the firm of Spiegel and McDiarmid, Esqs.; former Commissioner, former Executive Assistant to the Chairman, Public Service Commission, State of New York; former Trial Attorney, FPC.
Edmond Rovner	Legislative Director, National Governors' Conference.
Jack Sensenick	Governor's Representative, Commonwealth of Pennsylvania.
Samuel M. Sharkey	Public Information Officer, FCC.
Greg Skall	Attorney, General Counsel's Office, Office of Telecommunications Policy, Executive Office of the President.
Don S. Smith	Commissioner, FPC; former Member, Public Service Commission, State of Arkansas.
Joseph Solters	Case Manager, Bureau of Natural Gas, FPC.
Joseph C. Swidler	Of the firm of Leva, Hawes, Symington, Martin and Oppenheimer, Esqs.; former Chairman, FPC; former Chairman, Public Service Commission, State of New York.
Robert Szekely	Staff member, Bureau of Natural Gas, FPC.
Catherine Terry	Secretary to Commissioner Don S. Smith, FPC.
Guy Tripp	Of the firm of Hunton and Williams, Esqs., Counsel to Virginia Electric Power Company and the City of Richmond, Virginia, in FPC proceedings and before the Virginia State Corporation Commission.
Dr. Samuel Tuthill	Assistant Administrator, FEA.
David Walker	State Planning Officer, Advisory Commission on Intergovernmental Relations.
William Webb	Public Information Officer, FPC.
Barry White	Associate Assistant Secretary for Regional Programs, OSHA.
Lee C. White	Of the firm of White, Fine and Verville; former Chairman, FPC; Chairman of Citizen's Energy Council; Counsel for the State of New Jersey in FPC proceedings.
Dr. S. William Yost	Chief, Bureau of Natural Gas, FPC.
Joseph Zwerdling	Chief Administrative Law Judge, FPC.

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INDEX

TO THE RECOMMENDATIONS, STATEMENTS, REPORTS AND STUDIES OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

(January 1968 through December 1977)

INDEX

EXPLANATORY FOREWORD

Scope.

This Index provides access by subject matter and author to all the *published* work product of the Administrative Conference of the United States (ACUS) from its inception in January, 1968 through December 31, 1977: *viz*, 67 recommendations; 5 official statements; the reports in support of the foregoing; and several other reports developed under the auspices of the Conference which did not result in official ACUS action but which have been published as articles or books.

This Index has cross-references to the Recommendations of the Administrative Conference of 1953 (separately Indexed, see p. 1007) and to the Recommendations of the Administrative Conference of 1961 (Separately indexed, see pp. 1008).

How to use the Index

The Index contains an all-caps primary key word or phrase caption for each ACUS recommendation and official statement (together with its supporting report), for each report that did not result in official ACUS action, and for the authors of reports. Under each such caption appears a series of detailed subject-matter entries indexing the captioned document (recommendation, statement or report). In addition, the Index contains key word or phrase captions for major broad subjects in administrative law.

Under each key word or phrase caption will also be found detailed subject matter entries cross-referencing to other captioned documents containing pertinent material on the same subject.

Citation of ACUS recommendations

The first 35 recommendations of ACUS were sequentially numbered 1 through 35 and were so referred to in most publications until 1972. In that year the current official numbering system for ACUS recommendations was adopted whereby recommendations are numbered in the order for the year of adoption, e.g., "72–1" refers to the first recommendation adopted in 1972; "72–2" the second; "76–1" the first in 1976; etc. In this Index, the first 35 recommendations of ACUS are cited both by their original number and in accordance with the current system.

By contrast, the Recommendations of the Administrative Conferences of 1953 and 1961 are designated as such: e.g., "Admin. Conf. of 1953, REC. A (1)", where the capitalized letter "A" denotes a recommendation of that Conference addressed to the President (similarly, "B" denotes a recommendation addressed to Judicial Conference; "C" denotes a recommendation addressed to Civil Service Commission; "D" denotes a recommendation addressed to General Services Administration; and "E" denotes a recommendation addressed to Agencies) and where "(1)" denotes the first recommendation in a particular category; and "Admin. Conf. of 1961, REC. 1" where "1" denotes the first of those, sequentially-numbered, recommendations.

Citation of supporting reports

With three exceptions, reports in support of ACUS recommendations and official statements are published in the series of bound volumes entitled *Recommendations and Reports of the Administrative Conference of the United States* published by the U.S. Government Printing Office. Citations in this Index under the subject matter captions are all to volumes (number and page) in that series. Most of the supporting reports have also been published elsewhere, principally in law journals. A citation to the additional published source of such reports will be found under the author's name as a primary caption in the Index.

Three major studies (Davenport, *Procedures of the Internal Revenue Service;* Welborn, *Governance of Federal Regulatory Agencies;* and Willrich, *Administration of Energy Shortages*), were the basis for official Conference action, but due to their length and publication elsewhere they were not published in the ACUS series. Indexing of these studies will be found only under the author's name, and citations are to pages in the studies as published elsewhere.

Page-number references

Page-number references to ACUS recommendations and official statements are in Roman type; *all* other page-number references are in italics.

TABLE OF ABBREVIATIONS

Administrative Conference of U.S.	ACUS
Administrative Procedure Act	APA
American Bar Association	ABA
Atomic Energy Commission	AEC
Civil Aeronautics Board	CAB
Civil Rights Commission	CRC
Civil Service Commission	CSC
Code of Federal Regulations	CFR
Environmental Protection Agency	EPA
Equal Employment Opportunity Commission	EEOC
Federal Aviation Administration	FAA
Federal Communications Commission	FCC
Federal Deposit Insurance Corporation	FDIC
Federal Energy Agency	FEA
Federal Home Loan Bank Board	FHLBB
Federal Power Commission	FPC
Federal Reserve System	FRS
Federal Rules of Civil Procedure	FRCP
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